# Public Utilities

## FORTNIGHTLY

May 25, 1939





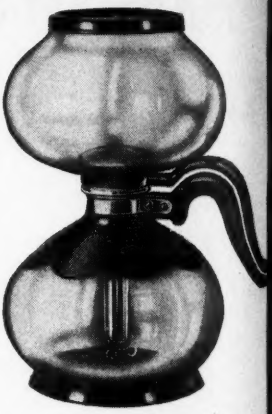

PUBLIC UTILITIES REPORTS, INC.
PUBLISHERS

# Step Up Gas Load with This Super Value

Genuine SILEX GLASS COFFEE MAKER

TRADE MARK REGISTERED U. S. PAT. OFF.

## Brides' Special



### Combination Glass Coffee and Tea Maker

PLUS STRAINEX FOR MAKING TEA

**8 cup decorated Delray Kitchen Range Model in black trim, with upper bowl handle, Pyrex brand glass. Patented Silex drainer with cloth strainer held under spring tension assures clear, clean coffee. Regularly $3.25 plus Strainex (60c) a $3.85 value for only.....**

**$2.95**

*10 cup size and red trim models slightly higher.*

SELL these Brides' Specials so you can sell the gas that brews the coffee for more than 185,000 new homes in June, the month when 14% of all weddings take place! Silex lines up a real promotion to start new homemakers off with the right coffee making equipment for use on the gas stove . . . offering a special that is ideal for wedding gifts and anniversaries! National advertising in the *Saturday Evening Post* and campaigns in 86 leading newspapers will run during May and June. Thousands of customers will be developed by this advertising. Tie up for extra load profits, now!

### *Two Electric Model Brides' Specials Also Available*

Delray 8 cup decorated electric model with Strainex . . . a $5.90 value for only $4.95. And the new Catalina Model (reg. $8.45) plus Tappit Catsup Dispenser FREE . . . a $9.44 value for $7.45.

### *Promotional Helps for Dealers*

Each special in this promotion attractively packaged in blue and silver box. In addition, dealers will be furnished with newspaper mats, streamers, and envelope stuffers.

Genuine SILEX GLASS COFFEE MAKER

TRADE MARK REGISTERED U. S. PAT. OFF.

**THE SILEX COMPANY, Dept. P-5, HARTFORD, CONN.**

*Creators of the Glass Coffee Maker Industry*

*Editor*—HENRY C. SPURR
*Associate Editors*—ELLSWORTH NICHOLS, FRANCIS X. WELCH, NEIL H. DUFFY
*Financial Editor*—OWEN ELY

# *Public Utilities Fortnightly*

VOLUME XXIII *May 25, 1939* NUMBER 11

*Contents of previous issues of* PUBLIC UTILITIES FORTNIGHTLY *can be found by consulting the "Industrial Arts Index" in your library.*



*Advertising Section*



¶ *This magazine is an open forum for the free expression of opinion concerning public utility regulation and allied topics. It is supported by subscription and advertising revenue; it is not the mouthpiece of any group or faction; it is not under the editorial supervision of, nor does it bear the endorsement of, any organization or association. The editors do not assume responsibility for the opinions expressed by its contributors.*

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# Pages with the Editors

SHORTLY after the turn of the century, two bright young men—both graduates of Harvard University's College of Arts—set out to seek their fortunes. One continued his studies at Columbia University Law School, and, upon his admission to the bar in 1907, won a place with the old law firm of Carter, Ledyard & Milburn.

ONCE launched in law practice in New York city, the strong attraction for the junior attorney of that day and place to enter public life made itself felt. The young lawyer went on to Albany as a state senator, then to Washington as an under official in the Wilson administration. He is still there—in the White House.

THE other young man went to Chicago and joined the rapidly growing Western Electric Company. He rose to successive positions within the Bell organization until today he heads the largest corporation in the world—the American Telephone and Telegraph Company.

THE point of this parallel is this: Suppose

*Harris & Ewing*

HERBERT M. BRATTER

*He pictures the FCC as regulation's old woman who lived in a shoe.*

(SEE PAGE 643)

*Blackstone Studios*

LUTHER R. NASH

*Depreciation accounting—a provision for retirement under another name.*

(SEE PAGE 653)

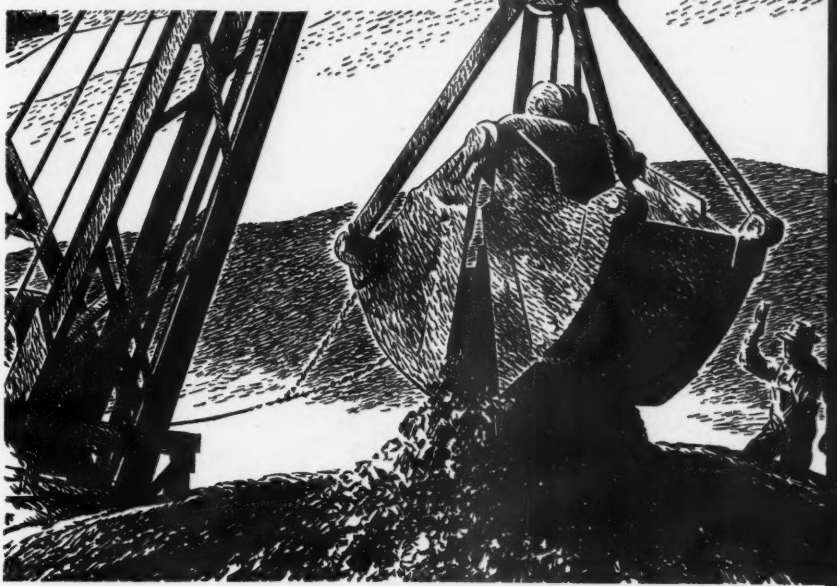
some elfin sprite had managed to switch the respective letters of introduction, or through some other magic had managed to send Franklin Roosevelt to work for the Western Electric and Walter Gifford to Columbia Law School. What would have been the result?

WELL, it is a fantastic idea. Quite possibly, Mr. Roosevelt, with his family tradition of public service, would not have felt at home under the restraint of corporate routine. Nor would the capable Mr. Gifford have necessarily become President of the United States, nor even a high public official, under the forced draft of legal training and New York politics. However, there is some food for thought in all this. It makes us stop to think how much alike the public official and the private business man are under the veneer of their respective callings.

BOTH go to the same schools, belong to the same organizations, and have about the same level of ability, industry, and honesty to begin with. Very often it is just some such fluke as a letter of introduction which sends the boy graduate into one field rather than

# WIRE ROPE IS THE LIFE-LINE ON YOUR BUCKETS—

*and GILMORE PRECISIONBILT WIRE ROPE— made of J & L Controlled Quality Steel— helps you protect life and your investment*



Good wire rope is good insurance against costly breakdowns, delays and injuries. And good rope — rope that lasts and gives long, safe, economical service — must be formed with precision from wire drawn from the finest steel.

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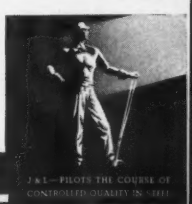
There is a Gilmore Precisionbilt Wire Rope for every materials handling need. Write today for our catalogue — describing the full range of ropes we make.

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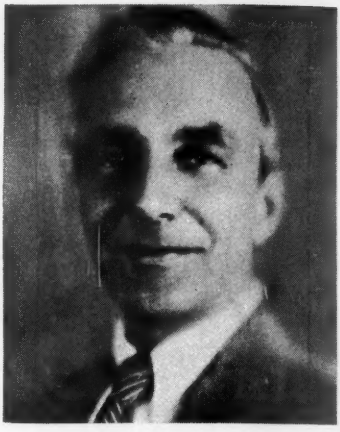
the other. Furthermore, there is nothing inherent in the environment of either business or government which destroys or magnifies these qualities. The techniques may be different but the general average of saints and sinners is about the same in one place as in the other.

WHY, then, twenty or thirty years later (not speaking now of Messrs. Roosevelt and Gifford particularly) do such products of their respective environments seem to look upon each other as members of another race or even another world? This is the fascinating thesis for a feature article in this issue by JAMES H. COLLINS (starting page 664). The author has for the past nine years been the editor of *Southern California Business* magazine and makes his home in Hollywood. Born in Detroit, he began writing around 1900, and was for twenty years a fairly regular contributor to *The Saturday Evening Post*, and numerous other magazines and business publications. His experience with government methods was gained during the World War, when he went to Washington as a volunteer in Herbert Hoover's Food Administration. He later became a salaried employee under the late Edward N. Hurley, then head of the Emergency Fleet Corporation.



JAMES H. COLLINS

*Government red tape—a necessary evil but a business handicap.*

(SEE PAGE 664)

RECENTLY, stories have come from Europe about popular German radio reception generally being put on a "push button" basis—at least in areas near the frontiers. We have become accustomed to such rumors about strict government control of European radio reception because of the tense international situation abroad. But what about radio in America? Have we not a Federal Communications Commission which seems to be constantly getting into hot water over radio regulation? In the May 11th issue of the FORTNIGHTLY we published an article by Herbert Corey, to the effect that the American radio may be censored to some extent on grounds of political expediency.

IN this issue we have an article which takes a somewhat broader view of the work of the FCC. The author of this article, HERBERT M. BRATTER, apparently is not greatly concerned about the danger of political censorship for the apparent reason that the FCC is up to its neck in so many more pressing difficulties of radio regulation.

AFTER all, when a Federal board is held responsible for doling out the various channels of our precious heritage of air waves, with acting as a traffic policeman so as to keep the ethereal radio paths from becoming a bedlam of confusion, with keeping abreast of technical changes which might overnight shift the entire radio industry from one end of the radio spectrum to the other, it seems hardly reasonable that it would have much time or energy left to assume the thankless rôle of political censor. At any rate, MR BRATTER believes that the purely technical mechanics of radio regulation will become so complicated in the near future that the FCC's present problems will seem as simple as the multiplication tables.

SINCE 1921 MR. BRATTER has been chiefly engaged as a foreign trade economist and statistician. He has worked for the Chinese government in Shanghai, for exporting interests in New York and Buenos Aires, and for the U. S. Department of Commerce and Treasury Department in the Far East, being assigned at one time to the American embassy at Tokyo as assistant commercial attaché. More recently he has been engaged in research, including the economic aspects of broadcasting. In this connection he has testified before the FCC on several occasions. He is the author of numerous articles which have appeared in various business and economic publications.

ALSO in this issue is a discussion of the "loss-in-value" rule in accounting for depreciation under systems approved by the Federal Power Commission and the state public service commissions. The author is the well-known utility economist, LUTHER R. NASH, now engaged as a consulting engineer with the Stone & Webster organization.

THE next number of this magazine will be out June 8th.

*The Editors*

# *In This Issue*

## *In Feature Articles*



## *In Financial News*



## *In What Others Think*



## *In The March of Events*



## *In The Latest Utility Rulings*



PREPRINTS FROM PUBLIC UTILITIES REPORTS

*Various regulatory rulings by courts and commissions reported in full text, pages 1–64, from 28 P.U.R.(N.S.)*

VULCAN VALVE HEAD, LG-1

The Vulcan Automatic Valve Operating Head is an advanced development for the high and ever increasing higher pressure and temperature conditions encountered in modern steam plants. Simplicity is the keynote in design and construction. A piston valve steam actuated thru a pilot valve provides positive operation—makes Vulcan Automatic Heads the greatest step ahead in Soot Blower Design in the past 15 years.

VULCAN VALVE ASSEMBLY

Vulcan Valves of completely corrosion resistant materials and stainless steels are designed for immediate accessibility; they are so successfully designed that of thousands in use no valve of this type has ever failed in service. Vulcan construction permits adaptation to every increase in pressure for modern boilers—no valve stems to break—no opening or closing against steam pressure—no regrinding of valves is ever required—valve packing is eliminated. All Vulcan Heads are equipped with Vulcan pioneer Under Arm Supports which have eliminated warpage of elements.

# Lowest Cost? . . . NO!
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# emphatically YES!

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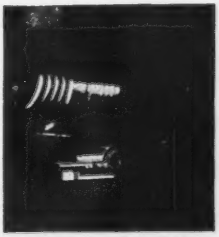
## SOOT BLOWERS

—are built with but one object—to provide industry with the highest quality equipment of this type it is possible to build. Every steam plant offers new problems in soot removal—Vulcan Engineers have successfully solved thousands of such problems. Vulcan installations are soundly designed, individually designed to do their work efficiently and economically—***to cut fuel costs and provide real savings in steam production.***

From the desks of design and layout engineers to drafting room to factory craftsmen and to field service, Vulcan personnel takes pride in providing a personalized installation, built to exacting standards for long service and economical operation—backed by a record of lowest maintenance. *Ask the Vulcan Engineer representative why Vulcan must build to highest standards only.*



VULCAN VALVE DETAIL

**Vulcan Soot Blower Corporation • Dubois, Pa.**

# Remarkable Remarks

*"There never was in the world two opinions alike."*
—MONTAIGNE

---

USHER L. BURDICK
*U. S. Representative from North Dakota.*

"I would like to see private business handle all of the business of this country."

CLARENCE BUDINGTON KELLAND
*Fiction author.*

"What's the good of public welfare exceptin' to give folks a chance to make private profit?"

M. S. SLOAN
*President, Missouri-Kansas-Texas Lines.*

"Our nation could exist and defend itself with the railroads alone; it could not do so if possessed of all the other agencies of transportation combined and deprived of its railroads."

HARRY L. HOPKINS
*Secretary of Commerce.*

"In making the TVA peace, the government demonstrated its good will by settling on generous terms. It struck a peace that will be a lasting and good peace, because it is a generous peace."

JAMES J. DAVIS
*U. S. Senator from Pennsylvania.*

". . . there is as much reason for the existence of a local flood control organization at a thousand points throughout the land as a woman's club, a service club, or a local civic unit of any kind."

WEEKLY NEWS LETTER
*American Federation of Investors, Inc.*

"The Supreme Court, which has long been regarded as the last line of defense against socialistic and communistic influences, can no longer be depended upon to stand as the bulwark of the type of free government our forefathers established."

SAMUEL O. DUNN
*Editor, Railway Age.*

"There is only one thing necessary to a solution of the railroad problem in the public interest, but that one thing is absolutely essential. This is application to all carriers of the sound American principle, 'Equal rights for all; special privileges for none.'"

M. J. GORMLEY
*Executive Assistant, Association of American Railroads.*

". . . it is not generally known that transportation, to a very considerable extent, is carried on by taxation. This is true because transportation facilities are provided by governments, Federal and state, without reimbursement for the use of such facilities."

HARVEY C. COUCH
*President, Arkansas Power & Light Company.*

"There was a time not so very long ago when the electric and power industry was in the 'dog house,' but that is not the case at present."

FLOYD W. PARSONS
*Editorial Director, Gas Age.*

". . . the increase in gas house heating last year showed an increase of nearly 14 per cent in the face of a general business decline."

EDITORIAL STATEMENT
*Industrial News Review.*

"What are the states going to use for tax money when the government takes over heavily taxed private properties and makes them tax-free?"

ROBERT A. TAFT
*U. S. Senator from Ohio.*

"The appeasement policy is completely insincere. The present administration has no confidence in the efficacy of private business activity."

PAT HARRISON
*U. S. Senator from Mississippi.*

"There is no such thing as perfection in government. There are always faults to be corrected, evils to be avoided, and new remedies to be worked out."

W. RAY JOHNSTON
*President, Monogram Pictures Corporation.*

"Television offers no threat to the motion picture industry in its present stage of development, and it can't become a threat for five, ten, maybe fifteen years."

EVERETT M. DIRKSEN
*U. S. Representative from Illinois.*

"Cheap power is supplied by means of appropriations out of the Federal Treasury and then the power consumers are handed extra taxes to make up for losses of state revenue."

WILL M. WHITTINGTON
*U. S. Representative from Mississippi.*

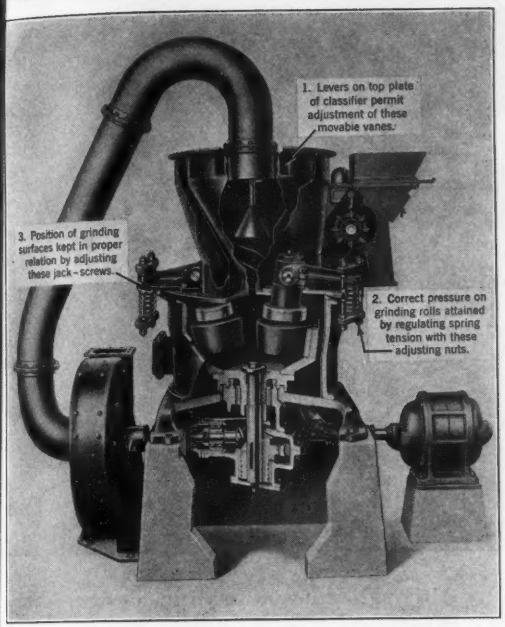
"Generally, reservoirs for power and flood control are incompatible. An empty reservoir is necessary to detain floodwaters. A full reservoir is necessary to develop power."

CHARLES A. WOLVERTON
*U. S. Representative from New Jersey.*

"There is evidence in the record of this (congressional) investigation of tactics smacking of Soviet Russia wherein one of the TVA lawyers put another TVA official through a severe grilling on suspicion that he had talked with the former chairman of the TVA, Dr. Morgan, about matters under investigation."

JOHN E. RANKIN
*U. S. Representative from Mississippi.*

". . . I want to say that if you will take the overcharges they (utility companies) are now collecting, turn them over to the Federal government, and loan them out at 3½ per cent interest, you can pay the national debt with them in less than forty years without placing any additional burden at all on the American people and without depreciating the principal."




# GET CORRECT FINENESS *EASILY...*

## *with this three point control of pulverization...*

THE performance of a pulverized fuel fired unit depends in no small measure on the ability of the pulverizing equipment to maintain proper fineness of coal over the required range of mill output. Coal that is too coarse adversely affects combustion, promotes slag formation on boiler surfaces and increases combustible losses. Grinding finer than is necessary increases mill power consumption and reduces capacity, with no compensating gain. Therefore, it is highly important that a pulverizer be provided with a suitable means for fineness regulation.

The C-E Raymond Bowl Mill has three adjusting points which together permit complete regulation of fineness and adjustment for wear on the grinding surfaces. The location of these mechanisms, as well as their complete accessibility, is apparent from the illustration above. Their purpose and their effect on mill performance are summarized below.

1.—MOVABLE VANES in the upper part of the classifier, regulated by individual levers on the top plate, permit positive control of fineness over the entire range required by any practical operating conditions.

2.—CORRECT PRESSURE ON THE GRINDING ROLLS—which varies with the grindability of the coal—is regulated by adjusting nuts controlling spring tension on the roller journals. Thus power consumption and fineness of grinding are maintained in proper relationship.

3.—ADJUSTABLE JOURNAL SADDLES are fitted with jack-screws which permit adjustment of the relative positions of the grinding surfaces, occasionally desirable, to compensate for wear.

All these adjustments can be made quickly and easily *while the mill is running.* Regulation of capacity, air-coal ratio and air temperature is equally simple and positive.

When next you are in the market for pulverizing equipment, look for construction and operating advantages in addition to such commonly accepted measures of pulverizer performance as reliability, power consumption, maintenance, capacity and fineness. Look at the C-E Raymond Bowl Mill—a pulverizer which has proved in service not only that it assures exceptional results with respect to these usual measures of good pulverizer performance but also that it possesses other special advantages such as convenient adjustment and control. Quiet, vibrationless operation. Ability to handle high temperature air. Positive Lubrication.

New catalog is available. Write for your copy.

A-440

Combustion Engineering Company, Inc., 200 Madison Ave., New York • Canada: Combustion Engineering Corp. Ltd., Montreal

**COMBUSTION ENGINEERING**

# *A set-up for meeting special requirements in strand*

WHEN special characteristics are required in strand, the place to begin is at the open-hearth furnace. The complete integration of all manufacturing operations under Bethlehem's system of control, beginning with steel making and following through all subsequent phases, is an important factor in making strand to meet special conditions.

**BETHLEHEM STEEL COMPANY**


# The Faster Pace of Developments in Steam Generation

The remarkable developments in steam generation that are taking place greatly emphasize the importance of not only the engineering, research, and manufacturing facilities but also the policies of the manufacturer of steam-generating equipment.

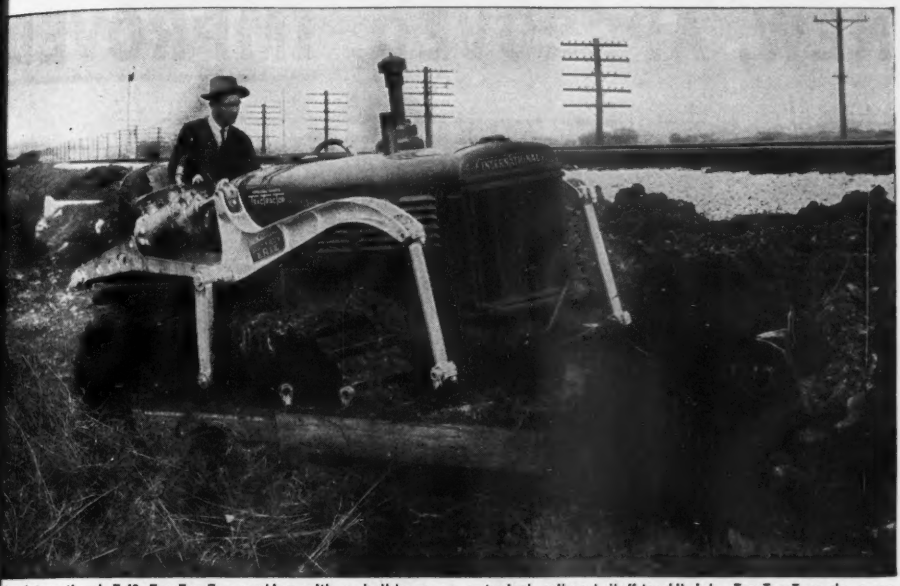
Steam pressures have risen; in one case 2500 pounds has been adopted for large-scale power production. Steam temperatures have risen to 950 F. In not much more than a single decade there have come into general use—direct firing of pulverized coal; water-cooled furnaces for dry or liquid-ash removal; fusion welding of boiler drums, with attendant effects upon boiler design; alloys for high-temperature steam; and improvements in steam quality and steam releases per unit of drum size, far in advance of prior achievements. These and other developments are making possible improved arrangements of heating surfaces and new designs of boiler units to meet the increasingly exacting steam requirements of modern power plants.

In contrast with these great changes in boiler design and manufacture, the two dominant policies of this Company are today the same as they have been for more than fifty years—***to meet***, and, whenever possible, ***anticipate*** the needs of those it serves—to merit the confidence of those who use its products.

G-146

THE BABCOCK & WILCOX COMPANY
85 LIBERTY ST. NEW YORK, N. Y.

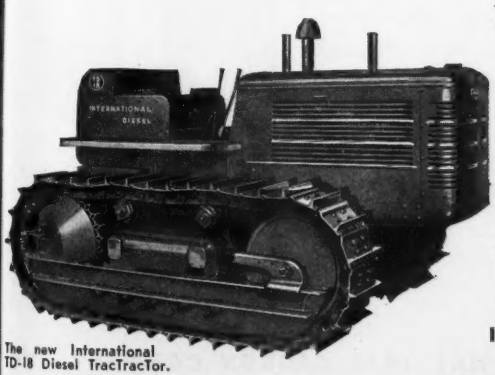
BABCOCK & WILCOX



An International T-40 TracTracTor working with a bulldozer on a typical railroad "off-track" job. TracTracTors do more work at less cost on a great variety of jobs like this.

# *Standardize on* INTERNATIONAL Tractors

The new 70 h.p. TD-18 Diesel TracTracTor meets the demand of heavy-duty mobile power users for a *big* International crawler. And it also rounds out this famous line, making it more desirable than ever for users to *standardize* on International Tractors and enjoy all the advantages such a program brings.



The new International TD-18 Diesel TracTracTor.

International offers a *complete* line of crawler tractors, wheel tractors, power units, and modified units (available to equipment manufacturers) . . . plus 42 models of motor trucks. It is *good business* to standardize on International—the longer you use this equipment the more it becomes apparent. See the nearby International dealer or Company-owned branch for information.

**INTERNATIONAL HARVESTER COMPANY**
*(Incorporated)*
180 North Michigan Avenue Chicago, Illinois

**INTERNATIONAL HARVESTER**

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PERMISSIBLE
ELECTRIC FLASHLIGHT
UNITED STATES BUREAU OF MINES
APPROVAL Nº 605
APPROVED FOR SAFETY IN AIR AND METHANE MIXTURES

UNDERWRITERS LABORATORIES INSPECTED
FLASHLIGHT FOR USE IN GAS AIR MIXTURES OF CLASS 1 GROUP D - INCLUDING GASOLINE - PETROLEUM - NAPTHA - ALCOHOLS - ACETONE LACQUER SOLVENTS AND NATURAL GAS
SERIAL Nº
NATIONAL CARBON CO. INC.
NEW YORK, N.Y.

# SAFETY

## INDUSTRIAL FLASHLIGHTS

THESE new "Eveready" focusing spotlights for use in explosive, gaseous atmosphere bear the inspection labels of *both* the U. S. Bureau of Mines and the Underwriters' Laboratories. They are SAFE under the dangerous atmospheric conditions listed on the label.

The new "Eveready" Safety Flashlights are of high quality semi-hard rubber reinforced with brass, with unbreakable, plastic lenses, special protected lamp and hand-replaceable, heavy-duty slide switch with positive "off" and "on" positions. Hexagonal heads prevent rolling, ring-hangers add to convenience.

"Eveready" Safety Flashlights resist water, oils, greases, gasoline, alcohol, acids, alkali, are non-conducting and proof against impact and dropping.

Guard wire holds lamp in spring-loaded socket. Should bulb break, spring ejects lamp-base, instantly opening electric circuit and thrusting hot filament against chilling guard wire.

**NATIONAL CARBON COMPANY, INC.**

*General Offices:* New York, N. Y., *Branches:* Chicago and San Francisco

*Unit of Union Carbide* UCC *and Carbon Corporation*

The word "Eveready" is the trade-mark of National Carbon Co., Inc.

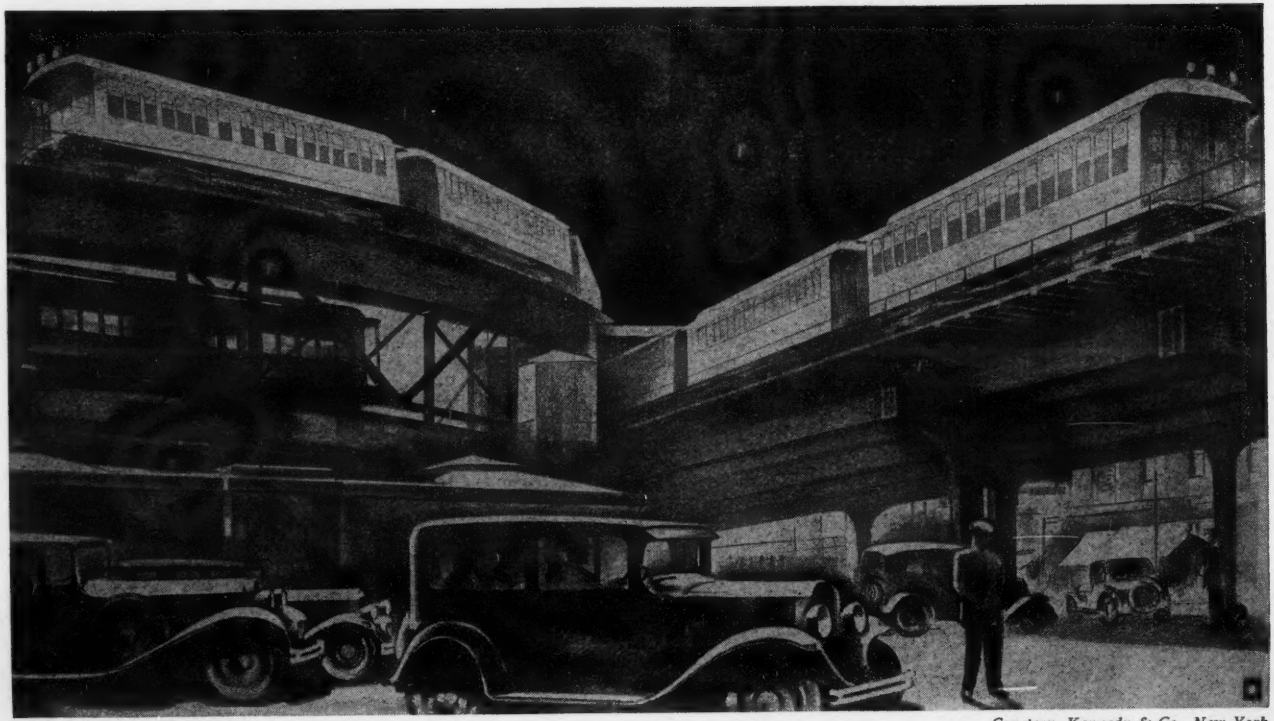
# Utilities Almanack

## MAY

| | | |
|---|---|---|
| 25 | Th | ¶ *National Electrical Wholesalers Association concludes meeting, Hot Springs, Va., 1939.* |
| 26 | F | ¶ *Northwest Electric Light & Power Association, Accounting & Business Practice Section, convenes, Vancouver, B. C., 1939.* |
| 27 | Sa | ¶ *The Illinois Telephone Association will hold convention, Peoria, Ill., June 7, 8, 1939.* |
| 28 | S | ¶ *Association of Transit Equipment Men of the Middle Atlantic States will hold meeting, Old Point Comfort, Va., June 8, 9, 1939.* |
| 29 | M | ¶ *Empire State Gas and Electric Association will hold gas operating group meeting, New York, N. Y., June 9, 1939.* |
| 30 | Tu | ¶ *Public Utilities Advertising Association will hold annual convention, New York, N. Y., June 18–22, 1939.* |
| 31 | W | ¶ *Canadian Electrical Association will convene for session, Digby, N. S., June 21–24, 1939.* |

## JUNE

| | | |
|---|---|---|
| 1 | Th | ¶ *Natural Gas and Petroleum Association of Canada starts convention, Niagara Falls, Ont., 1939.* |
| 2 | F | ¶ *American Gas Association, Commercial Section, concludes 2-day New York-New Jersey Regional Gas Sales Conference, New York, N. Y., 1939.* |
| 3 | Sa | ¶ *Washington Independent Telephone Association will convene for session, Everett, Wash., June 23, 24, 1939.* |
| 4 | S | ¶ *American Institute of Electrical Engineers will hold meeting, San Francisco, Calif., June 26–30, 1939.* |
| 5 | M | ¶ *Conference of Mayors and Other Municipal Officials of the State of New York starts session, Niagara Falls, N. Y., 1939.* |
| 6 | Tu | ¶ *Edison Electric Institute opens annual convention, New York, N. Y., 1939.* |
| 7 | W | ¶ *Canadian Gas Association ends 2-day convention, Hamilton, Ont., 1939.* |



*From an etching by L. Loszowick* *Courtesy, Kennedy & Co., New York*

**Traffic**

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Public Utilities
FORTNIGHTLY

VOL. XXIII; NO. 11 MAY 25, 1939

# Radio Power and Air-channel Regulatory Headaches

*While the struggle for the utilization of broadcasting frequencies, the beckoning for superpower stations, length of licensing periods, present troubles enough—looking to the future, technical changes in the field of short-wave broadcasting are quite possible, which, in the opinion of the author, will make present problems look antiquated.*

BY HERBERT M. BRATTER

REGULATION of broadcasting has become one of the government's pressing problems. Hardly a day passes when some aspect of the problem does not "make" the newspapers, and the members of the Federal Communications Commission know what it is to work under a spotlight.

The President has now requested Congress to revise the Federal Communications Act of 1934, primarily with the regulation of broadcasting in view. Although the FCC regulates telegraph and telephone communications as well, about nine-tenths of the time of its members is consumed on broadcasting problems.

This article cannot undertake the ambitious task of analyzing the entire broadcasting problem, but will center its brief attention on two salient problems of regulation: the license period and superpower.

At the outset it should be noted that there are at present over 772 licensed broadcast stations in the United States. Nearly half of these are small, local

stations using only 100 to 250 watts power. A few are much larger, 35 being authorized to use 50 kilowatts. Most of the American licensed stations operate on a commercial basis, selling time to advertisers, or carrying sponsored programs as part of a network. A few, however, are operated not only for profit but also for educational or municipal purposes, and the like.[1]

The number of stations which may operate simultaneously on a given frequency is naturally determined by the power they use. If a station uses more than a certain amount of power under given physical conditions, its signal will interfere with another station using the same channel or frequency. Without government regulation, the air would be a discordant babel of signals and voices. In fact, for a period during 1926 a chaotic condition did prevail.

It follows that the government's indispensable function is to determine whether or not a person or group desiring to set up a broadcasting station should be permitted to do so, and if the answer is in the affirmative, under what mechanical conditions such applicant should be licensed.

The government, then, in other words, must decide who shall control the use of a given channel, what power they shall use, what times they may use it, and what precautions they must observe to prevent interference with the licensed business of other broadcasters, or with the interests of listeners.

[1] Elaborate statistics on the broadcasting industry have been issued by the Federal Communications Commission in connection with the hearings of June 6-20, 1938. These are to be found in the commission's release 27615. See also release 32825 of April 1, 1939.

CHAIRMAN Frank R. McNinch of the FCC has described broadcasting as a public utility which should be regulated by the commission and which should not regulate the commission. The law, he emphasizes, makes it perfectly clear that there can be no vested right in the use of broadcasting frequencies. In other words, the frequencies assigned in licenses belong to the government, the Communications Act of 1934 providing that "the station license required hereby, the frequencies authorized to be used by the licensee, and the rights herein granted shall not be transferred, assigned, or in any manner . . . disposed of . . . unless the commission shall . . . consent in writing."

Like a public utility, a broadcasting enterprise is a licensed monopoly on a given frequency and in a given area, in return for which license the enterprise submits to government regulation. Broadcasting differs from other publicly regulated communications activities such as railroads, telephone and telegraph enterprises, or point-to-point commercial radio in that it does not undertake to provide all applicants with a fixed service at fixed rates. These latter enterprises are "common carriers." Broadcasting is not. The rates charged by common carriers are subject to government regulation. The rates charged by broadcast stations are not so regulated, being actually applicable not to the service given to the ultimate consumer of the programs broadcast, but rather to the advertisers sponsoring such programs. Broadcasting rates for time sold to advertisers are not comparable to the rates of common carriers, but rather to the advertising rates charged by newspapers and

periodicals. Limitations of time and the small number of available frequencies make it impossible for broadcasting to offer to all an unlimited service at a fixed price. It is not obligated to serve all who may desire to advertise over the air.

GOVERNMENT power to control rates is obviously the equivalent of the power to determine the economic welfare and even the existence of the enterprise concerned. There are those who think that broadcasting is vested with so great public interest as to warrant its economic control by the Federal government. Certainly the public cannot remain indifferent to any abuse of so powerful an instrument and influence as is the broadcasting business. On the other hand it must be recognized that the government is already vested with life-and-death power over broadcasting stations through its control of licenses.

Power has been a vexatious problem to the FCC. Since larger power tends to give a station larger coverage, and since reaching more listeners means that a station can charge advertisers higher rates, many of those in the broadcasting business have sought licenses for larger power. As the industry has grown, the maximum authorized power has grown. And always beyond that maximum, "superpower" has beckoned.

"SUPERPOWER," as the word is used by those in the industry, today means 500 kilowatts. Tangible symbol of superpower until this year was station WLW of Cincinnati. For four years WLW had an experimental license permitting it to broadcast during unlimited hours with a power of 500 kilowatts. No other American station has been licensed to broadcast programs regularly on a power of more than 50 kilowatts. Five hundred kilowatts gave WLW's programs a broad range over many different states. A calculation based on 1935 conditions showed that WLW's programs had a "secondary coverage" available to 74,000,000 persons. Naturally WLW enjoyed profitable revenues. It was not surprising that other large broadcast stations in the so-called "clear-channel" group sought licenses permitting them to broadcast programs on 500 kilowatts. This effort aroused the natural opposition of many of the smaller regional and local stations, and of some others, on the grounds that they would be injured if not actually driven out of business, that program standards would have to be lowered, or that superpower would place in the hands of a very few broadcasters a tremen-

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dous instrument for influencing public interest. In short, they claimed, the spread of superpower would not be in the public interest. Superpower is a controversial matter, and it is not the purpose of this writer to do more than indicate the nature of the problem.

FROM the standpoint of the FCC the question of granting applications for 500-kilowatt broadcast licenses posed a difficult and troublesome decision. Lengthy public hearings on the subject were held by the commission in the summer of 1938. Based upon the recommendation of its superpower committee, the FCC early in 1939 announced that it would not grant any regular licenses for 500-kilowatt broadcasting and that it would definitely terminate WLW's 500-kilowatt experimental license, thereby reducing its regular program broadcasts to the 50-kilowatt level. This reduction was made effective March 1, 1939. The announcement conformed to the views which seemed to predominate in Congress, and which had been publicly voiced by Senator Burton K. Wheeler. It is the reported sense of important members of Congress, of the administration, and of the President that, if superpower broadcasting is to be employed at all, it should be reserved exclusively for government use. Evidently superpower is feared as a monopoly.

Senator Wheeler is one of superpower's main stumbling blocks because he opposes monopoly. The Senator classifies several species of "monopoly" which "might get a stranglehold on radio": power in watts, power in concentration of ownership, and power of networks. Even the clear channel itself he considers "undesirable." It was the Montana Senator who sponsored the resolution, passed last June, which put the Senate on record as opposed to superpower. And it is the Montana Senator who on February 9, 1939, introduced the administration's bill to revamp the FCC into a 3-man body. This bill is still part of the unfinished business of Congress.

FROM the technical standpoint alone, as WLW has well demonstrated, superpower is thoroughly feasible. If the social factor, *i.e.*, the interests of small communities in local broadcasts, could be entirely ignored and if we were to set up our broadcasting system all over again, twenty-five 50-kilowatt stations could quite adequately and comfortably cover the country. But in the FCC it is believed that there are other good methods of getting to the rural areas.

Under the proposed new rules and regulations, which have in mind coverage in sparsely settled rural areas as well as in more densely populated regions and which will soon be adopted, stations on 40 "clear channels" will be able to reach the entire listening public.

Government officials who oppose superpower hold that its use would mean the ultimate elimination of many smaller stations which now meet local needs, and that it would thus be socially bad. It would, they say, revolutionize the present economic structure of the industry.

It should be noted in passing that the FCC's decision on WLW issued February 8, 1939,[2] while indicative of the government's attitude toward the whole question of authorizing regular

[2] Mimeo number 32197.

## Radio Advertising

*"GOVERNMENT supervision of advertising, naturally, has to do only with its effect on fair trade practices, public health, and the like, and not with the quantity of the advertising. Public criticism of broadcast advertising is voiced generally on the grounds of unpleasant frequentness or the devotion to it of too much time. Such objections, it goes without saying, the Federal Trade Commission makes no attempt to answer."*

broadcasts on more than 50 kilowatts, was concerned entirely with WLW's application for another renewal of its license to broadcast during regular hours on a 500-kilowatt experimental license. This application the FCC refused on the grounds, which its decision specified in some detail, that the applicant had not made a good case to show the necessity of renewal of its experimental license for the purposes named by WLW, and that its application amounted "in effect to an application for a regular license to operate on this frequency and power on condition that certain experiments be made during nighttime hours in the secondary service area of the station."

IN January this year a committee of the FCC recommended that the license period be increased to at least one year. "A longer term of license," it stated, "would be of benefit to the commission as well as the industry and the public." It made mention of the large proportion of its time which the FCC has had to devote to license renewal, and to the necessity for encouraging stability in the business of broadcasting. Broadcasters have long complained of the burdens of the present short licensing period. Now that the FCC apparently agrees, one may expect the period to be lengthened.

The present system requiring stations to apply every six months for renewal of their licenses involves the submission of a financial statement. Since the more than 770 licenses expire on various dates during the half year, and not all at one time, and since no company keeps its book on a weekly or monthly basis, it is now necessary for the licensees to call in the auditors twice each year on odd dates. Such audits are naturally time-consuming and expensive to the licensee. A longer

period would relieve the station of some of the extra expense these statements require. A provision that the annual audit made for tax purposes be accepted for license purposes would be of much additional help to the industry.

ANOTHER disadvantage of the short license period from the licensee's standpoint is that advertisers, who may go to considerable expense to prepare their programs in advance, desire all the assurance they can get that the stations with which they are contracting will be in business the full period of the advertising contract, and will be able throughout that period to offer them the same audience. As it is, contracts are drawn up with provisions relieving the advertiser of obligation if the station's license is not renewed. In practice this objection to the short period may not be serious, but it is none the less presented.

The main reason which has been given to justify the six-months' licensing period is that such a period, with the requirement of semiannual reports to the government on program standards and the like, is necessary to insure operation of a station in the public interest, convenience, and necessity. The fact that a licensee knows he will have to go before the commission within six months tends to make him "toe the mark" in observing what the commission indicates to be its standards of broadcasting. The reasoning is without doubt valid.

BUT, in respect to this contention, broadcasters point out that the FCC already possesses ample power to control stations. Under prevailing practice, for example, if a question is raised concerning how a given station is being operated, the commission may notify the station concerned, requiring it thereupon immediately to file an application for renewal of its license, even though a full six months has not elapsed since its last application was granted. Although there are those who question whether the commission today actually has the legal power to make such a request before the expiration of a full six months' period, it has become a common practice, and, from the standpoint of regulation of the broadcasting business, it seems to be effective. Thus far no one has contested at law the commission's procedure.

The existing law might be amended to provide specifically that when the FCC, during any license period, for evidential reasons decides that a station is not being operated in the public interest, the commission may require the applicant to file an application for renewal of its license. This amendment to the law would clear up any doubt now existing as to the FCC's power to make such requests.

IT should be noted that this practice of making a station apply for license renewal prior to the expiration of a full 6-month period throws on the station the financial burden of supplying all of the data demanded, as well as the legal burden of proving that it merits retention of its franchise. In the industry the belief exists that, in the event of a commission decision to reëxamine a licensee's desirability, within a six months' license period, the commission itself could be required to bear the burden of proof that continuance of the license is not in the public interest, convenience, or necessity.

From the government's standpoint, as well as that of the industry, the fact that a very large part of the FCC's time is at present taken up with handling applications for renewals of licenses is perhaps the most important reason why the period should be extended. Extension would enable the commission to give more attention to other problems of the broadcasting industry.

Section 312 of the Communications Act of 1934 empowers the FCC to revoke a license for various specified causes. Because this procedure would put the burden of proof on the commission, and because a licensee could appeal to the courts and thus delay if not prevent an adverse commission decision from being put into effect, § 312 has never been used.

SOME persons object to the shortness of the present licensing period on the grounds that, in effect, it gives the commission the power to censor programs. The argument is that broadcasters will make every effort to satisfy those who pass on their licenses every six months. It must be recognized that so long as there is government licensing and regulation of the industry, there will be some form of influence over program standards. Nor does it follow that government influence over programs is necessarily something undesirable. So long as the will of the commission truly expresses the sentiment of the majority of the people, the process of regulation is democratic and unobjectionable. Hitherto the commission's influence usually has been general in nature, and only infrequently detailed.

As alternatives to government delimitation of program standards through the administrative activities of the FCC, two courses other than government operation suggest themselves:

Self-censorship or discipline of the industry, and program control through an advisory committee made up of representatives of all the main groups concerned: the broadcasters, the government, and the listening public.

Self-regulation is desirable, although the above-mentioned inevitability of government influence as a corollary of government licensing means that self-regulation cannot, under the American system of broadcasting, be the only form of regulation. Self-regulation by individual broadcasters themselves and through an organization like the National Association of Broadcasters can make a valuable contribution within the broad principles from time to time outlined by the FCC.

¶ "GOVERNMENT *power to control rates is obviously the equivalent of the power to determine the economic welfare and even the existence of the enterprise concerned. There are those who think that broadcasting is vested with so great public interest as to warrant its economic control by the Federal government. Certainly the public cannot remain indifferent to any abuse of so powerful an instrument and influence as is the broadcasting business.*"

As for an advisory committee, it should be noted that in Great Britain, where broadcasting itself is a government function, several advisory committees, both national and local, have been appointed by the British Broadcasting Corporation. They are selected from the general public, and advise on music, religion, diction, television, and educational broadcasts. An important objection in this country to dependence upon such advisory committees is that it would be difficult to get such bodies to agree. Those advancing this objection point to the sharp cleavage of opinion on program standards which has at times developed within the 7-man FCC. More important is the devitalizing effect on programs, now so noticeable in Great Britain and to some extent already felt here.

In short, determination of what should or should not go out over the air is a matter in which the opinion of the FCC must always be taken into account. In this, as in other features of government regulation, however, the industry should always be protected against arbitrary or capricious commission action by the right to appeal to the courts.

The features of the present law relating to obscene, profane, and defamatory matters are being voluntarily complied with by broadcasters, in their own self-interest, and there have been very few occasions when the FCC has felt called upon to take broadcasters to task. A somewhat amusing recent happening was the FCC's action in proceeding to discipline a broadcaster (Station WQXR of New York) because it permitted unconventional language in a play, *Waiting for Lefty*. The commission promptly retraced its steps, however, when it learned that the same play was being given by a government-financed WPA group.

A MATTER of regulation which might be simplified by amendment to present statutes is the conflict, if such we may call it, between the FCC's and the Federal Trade Commission's functions in the supervision and control of misleading advertising. At present the FCC may cite a broadcasting station, while the FTC has the power to cite the advertiser, in cases where the law is not observed.

When a commercial advertisement in a newspaper, rather than one broadcast, calls for government regulation through the FTC, the newspaper itself is not held liable. It merely files with the FTC a statement of its willingness to observe the FTC's "cease and desist order" to the advertiser concerned. Broadcast stations feel that they should be given the same treatment in this regard as that accorded to newspapers, and that such equality of treatment will in no way adversely affect the interest of the public which the present statutes on commercial advertising are designed to protect.

In the case of broadcasting, as in other fields, there is no court decision which defines what constitutes public interest, convenience, or necessity. That these three qualities are inherent in broadcasting in general there is no doubt, but whether an application for a license for an additional broadcasting station, in an area already served by one or more stations, serves public interest, convenience, and necessity is always a debatable question, whose de-

## Possibilities of New Networks

*"WITHOUT attempting to predict what the next decade or two may bring to the broadcasting business, it is interesting to reflect on the possibilities of new networks, consisting of numerous short-wave broadcasting stations of limited range—say 100 miles—and connected with each other by coaxial cables. Theoretically, such networks can be operated at lower cost than present networks, it is said."*

termination by the government's administrative tribunal, the FCC, vests that body with great powers. It is much easier to say what is not in the public interest or convenience than to say what is.

EVEN if a court decision defined public interest, convenience, or necessity under a given set of circumstances, it is easy to conceive of different conditions which would under such definition be inapplicable in full. Thus, it would seem, the FCC will always be the judge of such criteria, and so long as its decisions are subject to appeal to the courts, there is no likelihood that this power will not continue to be vested in the commission.

So long as the number of channels or frequencies used in broadcasting to the public is limited as at present, those channels must continue to be regarded as public property, and the license to broadcast is a franchise subject to reconsideration or withdrawal for good reason.

In the broadcasting industry the station owner possesses only the physical equipment and good will of his station, but has no title to the frequency he is authorized to employ.

Government supervision of advertising, naturally, has to do only with its effect on fair trade practices, public health, and the like, and not with the quantity of the advertising. Public criticism of broadcast advertising is voiced generally on the grounds of unpleasant frequentness or the devotion to it of too much time. Such objections, it goes without saying, the Federal Trade Commission makes no attempt to answer.

PRESENT broadcasting regulation centers on the fact that the number of broadcast bands is strictly limited. This may not always remain the case. Looking to the future, technical

changes in the field of short-wave broadcasting are quite possible which might require an entirely different type of regulation and which would make present problems look antiquated. What delays such technical change is not so much its economic attractiveness *per se,* as the present atmosphere of public regulation in which changes must be made. We have been hearing a lot about television and facsimile broadcasting. Television's future is economically limited because of the limited range of a single station and the tremendous cost of program production. But the technical progress which has given us television has also made practicable short-wave aural broadcasting.

Without attempting to predict what the next decade or two may bring to the broadcasting business, it is interesting to reflect on the possibilities of new networks, consisting of numerous short-wave broadcasting stations of limited range—say 100 miles—and connected with each other by coaxial cables.

Theoretically, such networks can be operated at lower cost than present networks, it is said. Thus, more networks are technically possible, giving practically nation-wide high-fidelity distribution to high quality programs.

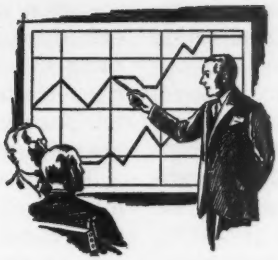
Such a system of networks would entail an entirely new type of receiving set in the homes of listeners. And it would entail a further economic problem, the scattering of listener attention from a relatively few stations, as at present, to a greater number of stations.

To the telephone industry the potentialities of such an expanded system of broadcasting are intriguing to contemplate. But, for the present at least, the lack of a concise public policy toward the broadcasting business, the general inability to see very far ahead, and the fear and justified caution of private business stand in the path of such development.

## Effect of War on Chinese Power Industry

ACCORDING *to recent dispatches from American commercial observers in China, the Sino-Japanese hostilities for the past eighteen months have caused a major disruption to electrical enterprise in eastern China, but have stimulated installation in western China—mostly of evacuated equipment.*

*At the close of 1936, there were 456 electrical plants in China proper, with a combined generating capacity of 596,986 kilowatts, representing an investment of $9,000,000. The greatest development had occurred in the coastal provinces. Following disruption and damage in the eastern area, Japanese power interests formed a Central China Development Company, in November, 1938, to rehabilitate power development in those sections. Much of the former equipment was hauled up rivers into the interior and reinstalled under independent Chinese auspices.*



# That Loss-in-value Rule In Depreciation Accounting

**Significance of the word "value" in this connection in the system of uniform accounts of gas and electric utilities, recently approved by the Federal Power Commission and the state public service commissioners—How shall monthly estimates of this "value" be made?**

By LUTHER R. NASH

During nearly one-half of the life of the electric power industry and more than three-fourths of the life of the gas industry, accounting for depreciation was practically unknown. When property was retired it was written off, if at all, through expense or charges against surplus. In fact, prior to sixty years ago advance provision for retirements was disallowed by the Supreme Court. For some years thereafter the matter was ignored, even in the leading case of Smyth *v.* Ames, decided in 1898. The first clear recognition of depreciation in the utility field by the Supreme Court came in 1909 and was then mentioned in only one of two leading cases.[1]

In the meantime the newly organized state regulatory commissions were designing accounting systems for use by the utilities under their jurisdiction. Some provision for retirement of property was included in all such accounts. The confusion resulting from these separate state systems continued until 1922 when a uniform system was adopted by the National Association of Commissioners and thereafter came into general use. This system was the result of several years of prolonged conferences between commission and utility accountants and engineers. After much discussion of the relative merits of depreciation and retirement accounting, the latter was adopted with specific provision for flexibility in accruals in view of the then recognized uncertainties as to the useful life of

[1] Knoxville *v.* Knoxville Water Co. 212 U. S. 1, 19.

utility property, of which at least approximate knowledge is assumed in depreciation accounting.

This feature of flexibility led to increasing opposition to retirement accounting from several sources, those who favored rigid straight-line depreciation and those who thought that the flexibility had been abused or that the retirement provisions had been inadequate in too many cases. The justice of much of this opposition has been recognized by the utilities.

For such reasons, and because of the growing complexity of the electric power business, modernization of accounting methods was thought desirable before this system had been in use ten years. Committees of the electric and gas utilities, at the request of the commissions, drafted their views as to the character of the needed modernization but no action was then taken. At the 1934 convention of the commissioners, instructions were given to a committee of their accountants to prepare a new uniform system of accounts. This committee, including representatives of state and Federal commissions, prepared a draft which was made available to the utilities early in 1936.

As far as depreciation is concerned, this draft provided for straight-line depreciation and a multiplicity of reserves. At a formal hearing before commission accountants and through briefs, the utilities protested against what was regarded as unwarranted refinement. The revised uniform system as approved by the state commissioners, and ordered by the Federal Power Commission in 1937, omitted the specific requirement for straight-line depreciation, substituting a provision that each accounting period shall make such charges to depreciation expense as will cover the then loss in value. It is to this phase of the new accounting program that this discussion is directed.

The most significant feature is the injection of the word "value" and the requirement that it be reconsidered each month. To most accountants the thought of recognizing value in their records is a decided shock. They have habitually and scrupulously dealt only with costs. Considerations of value have been left to engineers and lawyers in rate cases and other special situations.

Further examination, however, discloses that the final purpose of the new depreciation accounting is no different from that of the older retirement accounting; namely, the writing off at cost of property no longer useful. Obviously the intended meaning of "value" is not that contained in a leading Supreme Court decision in which reserves were recognized as properly providing for replacement rather than retirement of property. Nor does the conventional concept of value appear in any other part of the new accounting system.[2]

The accountant may well ask why, if the new reserve is to provide for retirements, it is not still called a retirement reserve; also, why the current provisions for retirements are not recognized as taking care of the retirement liability rather than a loss in value. If, in this connection, one were tempted to draft a syllogism, it would read substantially as follows: Depreci-

[2] United R. & Electric Co. *v.* West, 280 U. S. 234, P.U.R. 1930 A, 225.

ation is commonly defined as loss in value; books of account deal with cost, not value; therefore, depreciation as such does not belong in a system of accounts.

The reason why this word depreciation has been so commonly used in connection with accounting other than that of public utilities may be explained as lack of exactness in language or the different accounting and economic requirements of competitive enterprises. What is called depreciation is, nevertheless, generally a provision for retirements, although often lacking in uniformity. It is suspected that one reason for the substitution of this word in utility accounting by the commission experts on this subject is their disapproval of the way retirement accounting has been handled by the utilities in the past, and their wish to assign a different name to a modification of an old method.

Regardless of reasons or logic, we are now dealing with what we must call depreciation. The question, so far not specifically answered, is, how shall we determine each month what is called loss in value? Some of the commissions are favorable to or have already adopted the straight-line method as their answer. Others have carefully refrained from doing so, with the result that accounting practices differ, sometimes in parts of the same system. It is, of course, desirable to secure at least substantial uniformity in this important matter.

THE controversy between retirement accounting and straight-line depreciation has been going on for more than twenty years. The arguments for and against each would fill many volumes. While it would be impracticable even to summarize adequately these arguments here, some of their outstanding features may be mentioned. As its name implies, the outstanding characteristic of straight-line depreciation is its uniformity. Its proponents contend that useful life, the basis of this uniformity, can be estimated with sufficient accuracy to justify its use, with corrections when needed. They are apparently not concerned over the ultimate size of the accumulated reserves. They are skeptical about flexibility and the extended use of informed judgment as the basis of reserves and accruals thereto.

Those who favor retirement accounting no longer stress the element of flexibility in spite of its advantages, because of past abuses. Their practical experience has led them to doubt the advisability of basing their provisions for retirements wholly on useful life. They have collected extensive data

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from their own experience, have examined many published life tables, and have been discouraged by the wide variations for which they can find no logical or consistent reconciliation. They also think of the many new and different facilities, intended in part to bring about more prolonged usefulness, but for which no actual life history is yet available.

They may recall their expectation some years ago of retiring various steam turbine units because of the availability of more efficient new units, only to find that these new units of higher steam pressure could be superimposed on the older ones, giving the latter a new cycle of usefulness. They have also been confused by the recurring decisions of courts and commissions which have criticized large reserves, whether or not accumulated on the straight-line basis, in some cases limiting the reserves to certain prescribed amounts or percentages. They wonder why they should substitute an elaborate, superficially exact program, if in due time the reserves created thereunder may be declared excessive and the entire program authoritatively rejected.

IT is not questioned that straight-line depreciation requires substantially higher charges than have previously been considered adequate. Such charges, in connection with higher and more varied taxes, increased wages, and higher cost of supplies and construction, must have their effect on rate levels which have had a continuous downward trend, even during the depression.

The author has previously in these columns called attention to the interest of the customer in this problem.[3]

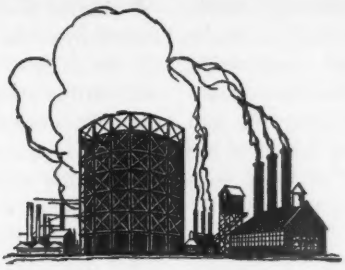
The vital point of disagreement relates to the extent to which reliance on estimates of useful life is practicable. There is little question about certain things, such as poles, the life of which can be reasonably estimated, at least on the assumption that they will not be prematurely removed for nonphysical reasons. But many studies which have been made in recent years show that the nonphysical causes of retirement, as measured in dollars of retired property cost, outweigh the physical causes by something like four to one, and that the character of the nonphysical causes is such that estimates of useful life are lacking in reliability and may be seriously misleading.

WE may now return to the question as to the specific basis and interpretation of the new accounting for depreciation, whether or not we see fit to regard it as related to value. How far the members of the various regulatory commissions are concerning themselves with this phase of the new accounting system which they have approved is not known. The importance of clarifying the existing uncertainties should not be disregarded. It may be pertinent further to examine the elements of the problem to determine what we are really trying to do through a revision of this phase of accounting, and how it can best be done.

FIRST, we seek to make provision for retirements which shall be adequate but, in the interests of more than 40,000,000 users of electric and gas service, shall not be excessive.

SECOND, such provision should be

[3] PUBLIC UTILITIES FORTNIGHTLY, October 25 and November 8, 1934.



Early Retirement of Property

*"DURING nearly one-half of the life of the electric power industry and more than three-fourths of the life of the gas industry, accounting for depreciation was practically unknown. When property was retired it was written off, if at all, through expense or charges against surplus. In fact, prior to sixty years ago advance provision for retirements was disallowed by the Supreme Court."*

systematic, with a consistent, logical, and defensible basis, rather than judgment without specific background, or arbitrary decisions without any justifiable support.

The next thing to be considered is the yardstick of adequacy. There are two recognized methods of measurement: one, the extent of existing depreciation or accrued retirement liability as compared with existing reserves; the other, the currently accruing depreciation or retirement liability as compared with current provisions therefor. The first method looks primarily at cumulative results, the second at the current contributions thereto.

THE first measure can be applied with reasonable accuracy through a study of the property, its physical condition, its age, the availability of safer or more efficient substitute equipment, the effect of growth of business on the usefulness of existing facilities, and other factors well known to utility executives. If such a study, made by capable engineers or others well acquainted with the property, shows an existing retirement liability consistent with the existing reserves, it is an indication that past accruals have been adequate and may safely be continued, with due regard for possible changes in future growth or other conditions.

If the reserve is shown to be deficient or excessive, future accruals can be adjusted accordingly. All such studies should, of course, give consideration to all causes of retirement which are properly provided for in the reserve, and they should be repeated with such frequency and in such detail as to permit adjustment for any significant change in conditions.

Procedure under the alternative method undertakes to determine directly the necessary current provisions

for future retirements. If the loss in value concept were literally interpreted, it would be necessary to make surveys of total value, presumably broken down into the prescribed classes of property, at frequent intervals, and to spread the intervening loss over the intervening accounting periods, with future adjustments for past errors.

IT is apparent that such procedure would not be practicable or accurate and it does not appear to have extended support. The practice commonly followed under this alternative method is based on useful life. On the assumption that this can be estimated with reasonable accuracy and that loss in value or increase in retirement liability proceeds uniformly, the problem is quite simple. As to the first assumption, clearly such uniformity is inconsistent with changes in actual value as commonly understood. Furthermore, while the right of a property as a whole to earn enough for its own retirement has never been questioned, many of its elements are unable to do so uniformly.

Transmission lines or supply lines to new territory may fail to earn anything beyond out-of-pocket costs for several years, but later make up the deficiency. Power generating units may not be loaded during their early life and then, after normal years of service, are held for reserve or emergency use with little earning capacity until finally retired. Such irregularities, however, tend to equalize each other in a composite property although they may not in the specific classes into which the reserve is now divided. The lack of uniformity in usefulness may suggest some departure from uniformity in loss-in-value computations.

THE assumption as to knowledge of useful life has always been questioned by those with utility experience. In the author's own intimate contact with utility affairs, covering more than the conventional life cycle of property, useful life, except for minor items, has persistently refused to conform to any known rule or standard, and departures from averages have been so great as to leave the averages with little or no significance. But this subject has already been discussed herein and elsewhere at such length as to make further statements superfluous.

If the straight-line plan is adopted, the procedure must be to make the best forecast possible and to make revisions from time to time. The older a piece of property becomes, the more definitely its retirement date can be visualized. When that date has finally arrived, it will probably be found that the result of these periodic readjustments has led to irregularity rather than uniformity in depreciation charges. Furthermore, this procedure ignores the relation of past reserves to the retirement liability then accrued, and offers no plan of coördinating past and future practices. Few electric or gas utilities have used the straight-line method in the past, but instead they have measured the need of current provisions by the size of the existing reserve.

A change to a program that ignores existing reserves and is concerned wholly with current loss in value is a radical one. While existing reserves of some utilities are clearly inadequate, and practically all of them are below matured straight-line accumulations, it is not believed that there has been a general neglect of reasonable adherence

to the accounting standards in effect and approved by regulatory authorities. Provision for this change in procedure should be made consistent with the adjustments and corrections contemplated in the straight-line program.

In addition to the foregoing problems involved in the clarification of the depreciation program is that of the attitude of courts and commissions, already referred to, toward the ultimate accumulation under the straight-line procedure. It is known through mathematical projections, although not yet by complete experience, that such reserves will ultimately amount to from one-third to one-half of the total cost of depreciable property, depending upon rate of growth. Our highest court has condemned straight-line reserves which were far less than such ultimate levels.[4] Some commissions have criticized much smaller reserves, however created.[5] Others have fixed limits of accumulation from one-half down to one-quarter of straight-line ultimate limits.[6] While commissions may now approve the straight-line method, presumably with knowledge of its results, their personnel, and perhaps their policies, are subject to change, and the courts remain on the job with an eye on the size of the reserve.

Assuming that the foregoing outline of the objectives of depreciation accounting and the methods through which they may be secured suitably represents the differing views relating thereto, it may now be appropriate to reëxamine them for their suggestions as to a solution. At once it appears that up to this time primary attention has been given by utility officials, the courts, and most of the commissions to the size of the accumulated reserves as the measure of the adequacy of depreciation charges. Most of them have thought that regularity of accruals thereto was desirable unless the size of the reserve indicated that increases or decreases were appropriate. Those who would disregard this index of adequacy and would give exclusive attention to current accruals have been in the minority.

If the prevailing views as to the significance of reserve size can be accepted as meeting the prescribed provisions for loss in value, a step in clari-

[4] Lindheimer *v.* Illinois Bell Teleph. Co. (1934) 292 U. S. 151, 3 P.U.R. (N.S.) 337.
[5] *Re* New York Teleph. Co. (1924) P.U.R. 1925C, 767; *Re* Chesapeake & Potomac Teleph. Co. P.U.R. 1932E, 193.
[6] *Re* Tennessee Elec. P. Co. P.U.R. 1930E, 312; *Re* Consolidated Gas, E. L. & Power Co. Order No. 7609, June 12, 1923.

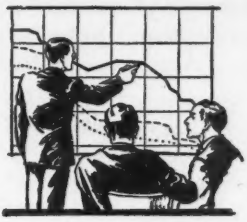
¶ "If *the prevailing views as to the significance of reserve size can be accepted as meeting the prescribed provisions for loss in value, a step in clarification will have been taken. That there is a relation between the value of a utility property and its reserves requires little demonstration. A property that has neglected to provide for its perpetuation through reserve accumulations is obviously worth less than one that has ample reserves invested, as is common practice, in the property itself.*"

fication will have been taken. That there is a relation between the value of a utility property and its reserves requires little demonstration. A property that has neglected to provide for its perpetuation through reserve accumulations is obviously worth less than one that has ample reserves invested, as is common practice, in the property itself. Assuming the existence of a reserve believed to be adequate, a substantial reduction caused by loss or retirement of property would indicate a loss in value unless or until overcome by a restoration of the reserve. If retirements were foreseen, even though not imminent, a loss in value would occur unless offset by a corresponding addition to the reserve. If, over a period of years, the reserve had steadily increased without prospects of offsetting retirements, it should be appropriate to reduce the credits thereto with a correspondingly curtailed loss on value as long as the reserve remained adequate. In short, loss in value would be measured by the accruals needed to maintain an adequate reserve, one representing the existing retirement liability.

It should be understood that, while this measure of loss in value is not in harmony with certain court decisions involving valuations, in which it has been held that existing reserves were not a measure of existing depreciation, the problem under consideration deals with accounting, not valuation, and the suggested solution would be expressed in different language if the word "value" had not been injected into a system of cost accounting. It is assumed that the contemplated reserves will be scrutinized by the courts as carefully as under accounting methods.

The study of reserves to determine their adequacy might initially divide the property into certain groups, such, for example, as one containing property normally retired for physical reasons, a second containing other property the retirement dates of which are known or can be approximated, a third for similar property with more remote and uncertain retirement dates, and an over-all provision for contingencies, casualties, etc. Such a breakdown would facilitate periodical reëxamination of the estimates relating to important individual items and the classes of items which such groups would contain, with timely transfers of items from one group to another more clearly defined group. Such periodical reviews would not be unduly burdensome or costly.

At best any such studies are lacking in wholly satisfactory accuracy. Some who are assigned to such jobs will differ from others in conservatism, foresight, knowledge of actual or prospective economic or engineering developments, judgment as to business growth, and other factors which have an important bearing on their problem. It has been the author's judgment that reliance should not be placed on a single finding of reserve adequacy, but rather upon a zone within which the estimates of different capable engineers would fall. The upper limit of such a zone would be that beyond which no reasonable need can be foreseen; the lower limit, that below which known needs would not be provided for with suitable margin. The limits of such a zone need not be determined with the same care as a definitely fixed reserve, and the permissible approximations would



## Retirement Accounting *v.* Straight-line Depreciation

*"THE controversy between retirement accounting and straight-line depreciation has been going on for more than twenty years. The arguments for and against each would fill many volumes . . . As its name implies, the outstanding characteristic of straight-line depreciation is its uniformity. Its proponents contend that useful life, the basis of this uniformity, can be estimated with sufficient accuracy to justify its use, with corrections when needed."*

mean a substantial saving in studies of retirement liability.

This zone plan was recommended by the author in 1936, has met with the approval of utility accountants and executives, and has had a limited use and regulatory approval. That such a plan of providing for depreciation has merit is asserted in the report of a special committee of commission accountants on this subject, presented at the 1938 convention of the regulatory commissioners, in which the following language appears:

> The rate of depreciation is an estimate, and frequently the correct rate lies within an upper and a lower limit of reasonableness.

IF a reserve within such a zone were drawn down toward the lower limit, the loss in value thereby indicated should be corrected by such increase in credits as would bring the reserve back toward the upper limit. If that limit were reached, it might be understood that no further loss on value was occurring for the time being. The simplicity of such a plan is in sharp contrast to the complications and expense of the elaborate system of straight-line depreciation which is being strongly advocated by some accountants, but which, it will be recalled, the Supreme Court has characterized as "elaborate calculations which are at war with realities."

While it would be possible to break down such a reserve for a property as a whole into classes of property, possibly with differing zone widths, it is doubtful if greater real accuracy or protection from loss would thereby be secured. A breakdown, in which causes of retirements and the definiteness with which they can be foreseen are factors, may be of help in determining the accuracy of reserves, but this would correspond only in part with the prescribed subdivisions of fixed capital. The lack of exactness which such studies would

disclose suggests that refinements do not add to accuracy and that over-all figures may embody smaller errors than segregated ones.

THE utility industry has always believed that the fixing of depreciation charges and reserves was to a large extent a matter of informed judgment rather than a mathematical procedure. Such judgment cannot be exact because of the unavoidable uncertainties on which it is based. It may change with the passage of time, perhaps without a clearly demonstrable basis, but nevertheless with soundness unaffected by unrelated considerations. That lack of exactness is inevitable is clearly stated in the report, previously referred to, by commission accountants on this subject in which the following comment appears:

> To say that the effect of all these various influences affecting the rate of depreciation of property can be expressed by any one formula, which conforms precisely to the progress of depreciation in all cases, is a delusion. The technicians entrusted with the determination of rates are not imbued with prophetic vision as to events which lie in the future.

With agreement to the extent above indicated between utility and regulatory interests, it would appear that refined mathematical processes should be avoided in working out the unsettled phases of the depreciation accounting problem. If some latitude or range of judgment is a logical necessity, it is available in the plan of reserve zones outlined herein. It should not be difficult to determine appropriate zone limits, particularly if it is intended to keep safely clear of close contact with them.

ANY regulatory agency which objected to any flexibility or uncertainty as to the movement of the reserve within the zone could prescribe, as has already been done, a formula to control such movements. Such a formula could systematically increase or decrease the credits to the reserve as it tended to approach the lower or upper limits, or more latitude could be allowed under abnormal conditions.

It is believed that a reserve program, such as outlined herein, offers a reasonable solution of the uncertainties now existing in the new depreciation program. The impression may be gained that the initial determination of reserve adequacy or of suitable zone limits would involve excessive complications and costs, comparable with those necessary in straight-line depreciation, at least if the possible refinements outlined herein are adopted. The use of the zone system makes many of these refinements unnecessary in that it avoids assumptions as to useful life which cannot be supported by available data. It necessarily deals with life expectancy but with less precision, although not with less real accuracy.

In the transition stage from an existing prescribed accounting procedure to another which enlarges the scope of the reserve and curtails the scope of maintenance, there should be a gradual increase in the reserve which is not subject to mathematical analysis. A tentative upper reserve limit, based on approximate studies only, may be all that is immediately justified, leaving the more comprehensive studies to a later date when a better factual basis is available for their support and scope. Then, a more clearly defined zone system would be appropriate and could be maintained at far less cost than straight-line depreciation, without

sacrifice of accuracy or protection of investment.

It has been stated herein that the word "value," even when defined as "service value," does not belong in an accounting system which, other than for minor accruals, deals with costs. It has also been pointed out that the new system, although bearing the depreciation label, deals in fact with retirements and accruals therefor. The reserve is intended to represent the existing retirement liability, not a loss in value. Logically, therefore, the word "value" should be withdrawn and the appropriate word restored.

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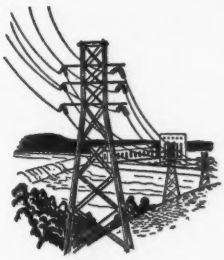


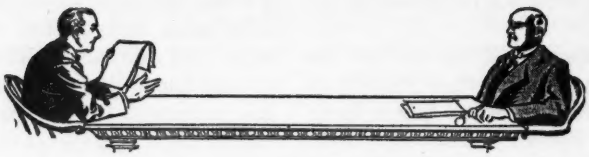
## A Cold Wire for a Long Power Haul

REFRIGERATED *electric power lines, using cold like that of interstellar space to overcome the great handicap to long-distance transmission of electric power, were discussed in Boston recently as a result of work at the Massachusetts Institute of Technology.*

*In the Institute's new low-temperature laboratory, where the most powerful magnets in the world, designed by Dr. Francis Bitter, make possible the production of the lowest temperature yet achieved by man, one-thousandth of a degree above absolute zero, new facts about cold and electricity are coming to light. These were described at a public lecture on January 15th by Dr. Frederick G. Keyes, head of Technology's Department of Chemistry.*

*A discovery made in Europe nearly thirty years ago is the basis for hope of a new kind of power transmission. This is that at a point close to 459.69 degrees below zero Fahrenheit, which is the absolute zero where heat ceases to exist, some metals like lead, mercury, and zinc lose virtually all their electrical resistance. In them at absolute zero temperature an electric current would flow an infinite distance with no loss.*

*Prohibitive expense and supreme danger of explosion have retarded efforts to produce cold approaching absolute zero. Moreover, a strong magnetic field destroys the superconductivity. At Massachusetts Institute of Technology, however, a modified method of dropping close to absolute zero has been developed. It is completely safe and requires only a third of the power needed by other methods.*



# Same Fellows–but How Different The System!

**No great public utility has ever been developed under government control—From gas to radio, utilities have been the creations of rugged individualists, often working against heart-breaking obstacles—Individualist and Bureaucrat are the same kind of fellows—It's the system that makes the difference in results.**

By JAMES H. COLLINS

HERE they are! In this corner, the Rugged Individualist, and opposite him, the Government Bureaucrat, and the fight is already far advanced, with both contestants showing punishment.

Our money is on "Ruggie," of course.

And we regard "Boorie" as just a palooka and a punk.

But in reporting this fight, I am handicapped.

For, in my time, I have been both of them, and know that they are the same kind of fellows at bottom.

And, therefore, I believe I can tell you what makes them both the way they are.

Two graduates come out of the same college.

One lands a job with the XYZ Corporation and, if he has what it takes, in fifteen years becomes vice president in charge of sales, or production, or research.

The other passes a civil service examination while waiting for a job and starts in government service, and in fifteen years rises to be the chief of a bureau or division.

At college, they were close pals and fraternity brothers.

Today, they meet in Washington, or Albany, or Sacramento, and fight at the drop of the hat. Each speaks a different language, and is ready to battle with official rulings, injunction suits, investigations, and lobbying.

Yet, if they had been switched when they came out of college, if their letters of application had gone to the wrong address, like Walter Gifford's who sought a job with Westinghouse and landed with Western Electric, and so to the Bell Telephone presidency, they would be just the same.

## SAME FELLOWS—BUT HOW DIFFERENT THE SYSTEM!

As our pink friends say, they are the victims of a system.

Presently, we will look into the system.

IT is now just on the eve of a century since a starved artist hung around Washington, offering an invention to the government for $100,000.

The government refused to buy.

That invention was Morse's electric telegraph, and on May 24, 1844, Morse sent his first message, "What hath God wrought?" to Baltimore, and it was telegraphed back to him, in the Supreme Court room at the Capitol.

Congress had appropriated $30,000 to build this first American telegraph line, but would not go any further into such a visionary scheme.

It is interesting to speculate about what the telegraph might have been had the government bought and developed it from the beginning.

We must speculate, because our government has never developed such a utility from the grass roots—it is only when private enterprise has built something fundamental that government ownership and regulation are talked about.

Morse was actually starving, for once, when a student lent him $10, he confessed that he hadn't eaten the past twenty-four hours.

But, with the government out of the picture, he set about raising private capital for a line from New York to Philadelphia—hard financing, because even to invest in such a crack-pot project brought ridicule.

When there did seem to be something in the telegraph, little competitive lines sprang up here and there, and his patent was infringed.

By 1856, there were many of these lines, none making money, and another rugged individualist, Hiram Sibley, brought them into a merger, calling it the Western Union Telegraph Company—like merging a lot of paupers to make them rich men, people said.

MORSE eventually became wealthy, and got all those medals that appear in his schoolbook portrait, and immediately his invention was improved. He had planned for recording messages on a tape, but telegraphers soon learned to read by sound. The duplex method of sending a message in opposite directions simultaneously over the same wire was perfected—today, by musical tones, 96 messages can be sent over one wire at the same time.

Morse had something that government has never been able to use effectively—salesmanship.

He never lost a chance to demonstrate, and interested men who helped him. One of these was a well-to-do iron founder, Alfred Vail, who put in some money, and later devised the sounder for ear reading. The chairman of the congressional committee that considered his invention, Francis Smith, resigned to become a partner in his enterprise. He cleverly used publicity.

The Democratic national convention, meeting in Baltimore, nominated Silas Wright for vice president, and the fact was telegraphed to Morse, in Washington. He showed the message to Wright, who said he would refuse, and that was telegraphed back to Baltimore. The convention refused to accept it until a committee had gone to Washington for confirmation.

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That made a stir in the newspapers, and helped sell the telegraph to the public.

Now, let us suppose that Congress had bought Morse's invention. Next, an enabling act would be needed, empowering some government department to build and operate telegraph lines—but what department?

In 1844, there were only State, Treasury, Justice, War, Navy, and Post Office. Interior was not to come until 1849; Agriculture started in the 1850's as a cubbyhole in the Patent Office; Commerce and Madam Secretary were as remote as women's suffrage. The recent device of creating a new bureau to administer a new law was undiscovered.

Nor were there any of the economic and scientific specialists so numerous today. Morse himself was the greatest living authority on telegraphs, and he had had to work by cut-and-try, thankful for chance bits of technical information.

At a certain point, for instance, his telegraph was complete—all but the click. Joseph Henry had increased the sensitivity of magnets by winding them, almost inventing the telegraph, and then going on to other researches in pure science. This was just what Morse needed, and applied thankfully.

There would have been no 8-year period of wildcat development by rugged individualists who built local telegraph lines, hoping to get rich, because the field would have been a government monopoly. That would have saved the rugged individualists, and probably the widows and orphans, a lot of money—and have saved Western Union the trouble of being born.

Having bought the invention, Congress might have got cold feet and refused to appropriate money for its development. This happened after the money had been appropriated for the Baltimore-Washington line, when Congress refused to buy.

Having appropriated money for development this year, Congress might have refused to appropriate next year, alternately blowing hot and blowing cold, a familiar situation in many government projects.

Congress might have halted development work for an investigation in such a situation as Morse himself met in building his experimental line.

He started with the idea that the wire should be underground, and spent two-thirds of his government money before it was realized that the line could not be insulated by methods

¶ "THE *familiar story of illuminating gas, railroads, street transportation, electric light and power, radio broadcasting —all those utilities which, through their very growth and the part they play in the everyday lives of the whole population, have come under government regulation, and are proposed for government ownership and operation—is a story of resourceful individualists, fighting the early battles with the single advantage of being obscure, and therefore able to fight as individuals.*"

known in that day. Whereupon, he quickly switched to an overhead line, using a method of insulation suggested by Ezra Cornell, later founder of the university—bottles were thrust in holes bored in the poles, winding the wire around the necks. Cornell was another man attracted to Morse by salesmanship.

Politicians might have brought pressure for telegraph lines where they could not pay, wire-pullers might have landed jobs in the telegraph service in that time of spoils . . .

Could Morse, himself, put in charge of a government telegraph project, have made it successful under the rules? Certainly no inventive genius has ever done that.

DURING the World War, many business executives got experience of government methods as dollar-a-year men in the numerous war bureaus.

To the vice president in charge of sales, or production, or purchase, or personnel, it was a striking change in the conditions under which to do a day's work.

If he had that experience, and remembers those days, he will recall that government work seemed to involve little change at the start.

Perhaps he was called to Washington by an outstanding man in his industry, as like as not a competitor of his company, and asked to get in and straighten out some tangle, to help win the war.

His company loaned him to the government, and he climbed up to a back bedroom on the top floor of an old residence, requisitioned for war bureaus. His green secretary typed away in the stripped bathroom adjoining.

Had any business concern in his own state attempted to work employees in such quarters, the factory inspectors would have promptly prosecuted it for overcrowding, violation of fire hazards, and other regulations; but Uncle Sam knows no factory inspector. Those were war times, true, but government is always a patchwork of palaces and hovels, measured by working conditions.

In a few days he was getting mail addressing him as "The Honorable," and almost immediately was receiving about five times as many visitors as at his normal job.

About one visitor in five had something to offer, or to say, that belonged to his war work—which was, we will suppose, the locating and purchasing of this and that, service of supplies, on the huge scale demanded by war.

THE other visitors included everybody from cranks, with crack-pot ideas, to smooth and subtle fellows who look after interests in Washington. Among those present, business interests, of course.

Their visits were paid for the purpose of gauging new conditions brought by war, and taking steps to see that their particular interest was not hurt—and the vice president who remembers his dollar-a-year days will admit that these gentlemen thoroughly knew their business, and got approximately what they wanted.

Soon, our imaginary vice president was aware of three things that enter into government business, and which are hardly known in private business.

First—politics, represented not only by the gentlemen who are vulgarly called "lobbyists," but by almost any

## Government "Red Tape"

*". . . all public business is authorized and regulated by Congress, which expresses what shall be done, and what shall not be done, by laws. As far as possible, Congress endeavors to forestall graft, and when ways are found of evading laws, Congress meets that situation by more laws, so that as a bureau grows older, its legal bindings become tighter and tighter. And this is the famous 'red tape' of government."*

crack-pot whose attention was attracted to the vice president's work. All had votes, and many came accompanied by their Congressmen.

One day, a gaunt middle-aged woman was sent to his attic office, after being shunted around from one room to another. She had an idea for winning the war, but nobody seemed to understand it, and so she was passed along. Her idea was sound, and he understood it, because it lay in his industry. To save wheat people were being asked to eat cornbread. Cornmeal from southern states often gets wormy, and she wanted to urge this bureau to sterilize the corn before grinding, so people would not be prejudiced against cornbread.

It was really something to do, but she was so earnest that our vice president leaned back in his chair and laughed, and the woman strode out indignantly, to appear next day with her Congressman and have him fired. As he was not on the government payroll, that was impossible—a new kind of public servant to the lady.

So, No. 1 was the rule that, in government work, the political goblins will get you if you don't watch your step. Public business is everybody's business.

Rule No. 2 cropped up when that hot Washington summer made him wonder why electric fans had not been installed in the old residence. He asked why, and was referred to a grizzled chief clerk, transferred from a regular department to keep his careful civil service eye on this new war bureau.

At that stage of the war, the art of raising and spending billions had not yet been discovered, and the chief clerk said there was no appropriation for electric fans.

He was as hot and bothered as everybody else, had come from a bureau where fans had been in use for years, but those fans had at one time or other been carefully anticipated in the yearly appropriation. Maybe next year's appropriation for this new bureau would take the edge off next summer, but this year he was helpless.

So, our vice president learned something about the appropriation, meanwhile going out and buying fans himself, an example that was followed by other dollar-a-year men.

As distinguished a dollar-a-year man

as ex-President Hoover, then food administrator, ran into the appropriation when he wanted a small car or two to carry his assistants about Washington. The appropriation said nothing about that, so Mr. Hoover bought a half-dozen Fords, hired drivers, and started his own taxi stand at the food administration door.

More dictatorial than all, however, was Rule No. 3.

That is the enabling act that establishes every government bureau, and the subsequent laws and rulings, and the older the bureau, the more complex its legalities.

In private business, if there is a job to be done, somebody tells the boss, and he tells somebody else to get it done.

In government business, when there is a job to be done, nobody moves until the law and the rulings have been studied, to see if there is authority to do the job at all, and if so, how its execution is specified and limited.

For example, government purchases must, by law, be made under competitive bids. Had there been money in the appropriation for those electric fans, no chief clerk in his senses would have gone out, bought them, and started them running. Bids must be invited, tenders for all made, and the order given the lowest bidder.

To a certain extent, the experienced government official has ways of stepping up the procedure in an emergency, and still keeping within the law.

War might disclose a sudden need for, say, complex navigation instruments, wanted on a ship leaving New York tomorrow morning. A government purchase officer who knew his job might take telephone bids from the two or three concerns able to supply such equipment, and place the order with the lowest bidder.

There might be only one firm able to supply the instruments, but the telephone would publish the fact that the government invited tenders, and that one concern would be the lowest bidder, and also the only one.

But all public business is authorized and regulated by Congress, which expresses what shall be done, and what shall not be done, by laws.

As far as possible, Congress endeavors to forestall graft, and when ways are found of evading laws, Congress meets that situation by more laws, so that as a bureau grows older, its legal bindings become tighter and tighter.

And this is the famous "red tape" of government.

As thousands of business executives got war experience that enabled them to contrast government and private business procedure, so more thousands were initiated in the mysteries of government during the early stages of the New Deal, which was pretty much the same kind of emergency.

Those executives with dual experience know that the Individualist and the Bureaucrat are just about the same kind of fellows, differing only as they have been shaped by their working conditions under two widely varying systems.

They suspect that if Samuel F. B. Morse had been set the task of developing the telegraph even under the government conditions a hundred years ago, he would hardly have won all those medals.

Their personal acquaintance with government executives makes them aware that it is the system that makes the man, and that the Individualist would have become a Bureaucrat, and vice versa, if there had been a "Little Buttercup" around to do the cradle-switching when they were business babies.

Was it not a Bureaucrat who resigned from the postal service, and took hold of Bell's bankrupt telephone company, and created "AT&T"? Without the Individualist Theodore N. Vail, the technical and business development of the telephone might have been delayed many years, and its rewards have gone to others than Alexander Graham Bell.

The familiar story of illuminating gas, railroads, street transportation, electric light and power, radio broadcasting — all those utilities which, through their very growth, and the part they play in the everyday lives of the whole population, have come under government regulation, and are proposed for government ownership and operation—is a story of resourceful individualists, fighting the early battles, with the single advantage of being obscure, and therefore able to fight as individuals.

What a new utility could become under the other system, nobody knows, for none has ever been brought to its full usefulness under bureaucratic conditions.

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## Famous Firsts in Utility Business

THE business of supplying water for domestic and industrial needs is the oldest public utility service in America. The first waterworks in the United States was built by the Pilgrims at Boston in 1652, just thirty-two years after they landed at Plymouth Rock. It was a gravity line from a near-by spring. The first water-pumping machinery in this country was used at Bethlehem, Pa., in 1754. This early pump was built of wood and pumped water through hemlock log pipes into a wooden reservoir.

* * *

NATURAL gas was used for heating homes centuries before the birth of Christ. The early Chinese had extensive gas distribution systems built with bamboo piping. The first natural gas well in the United States was discovered in 1821 at Fredonia, N. Y., and became known as the "eighth wonder of the world," attracting a visit in 1825 by the French hero of the American Revolution, General LaFayette.

* * *

BETTER known because of more recent occurrence are the records of the first commercial operations of telephone, electricity, and radio broadcasting service. Although Alexander Graham Bell's first experimental message over the telephone to his assistant, Mr. Watson, occurred in January, 1876, the first regular private line did not go into operation until April, 1877, in the city of Boston. Edison perfected the incandescent lamp in 1879, but the first commercial central electric station at Pearl street, New York city, did not go into operation until 1882. Regular radio broadcasting began with the famous Harding-Cox election progress returns from Station KDKA, Pittsburgh, Pa., November, 1920; but the first commercial broadcast sponsored by an advertiser came from Station WEAF, New York city, in 1922. The advertiser was the Queens Borough Realty Company.

# Wire and Wireless Communication

CHAIRMAN Norton of the House Labor Committee was expected, sometime during the latter part of May, to move for a "suspension of rules" to bring up her wage-hour amendment bill on the floor of the House. Mrs. Norton's decision followed the action of her committee in approving the bill by a vote of 16 to 2.

It will be necessary for the proponents of the bill to get the approval of two-thirds of the members voting on the floor of the House in order to accomplish the "suspension of rules." This procedure is likely to be followed, however, because it has the effect of a "gag" against further amendments from the floor. It is not opposition to these amendments which concerns Chairman Norton, as much as a fear that critics of the wage-hour law may use this bill as a device for springing even more far-reaching amendments. For this reason, Chairman Norton, who is supposed to be handling this legislation for the administration, will probably follow the safer strategy of seeking a suspension of the rules rather than to bring her bill up on the open calendar.

As approved by the committee, the Norton bill would (1) exempt from the act employees earning $200 per month and over; (2) give the wage and hour administrator broad authority to approve "constant" wage plans; (3) broaden the existing exemptions for agricultural workers; (4) exempt switchboard operators in telephone exchanges with less than 350 stations; and (5) relieve employers complying with rules and regulations issued by the administrator of any liability in event the courts should hold these rules and regulations invalid.

The bill also gives the administrator certain discretionary authority to determine whether messenger boys must be included under the minimum wage provisions. It provides that the administrator may exempt messenger boys from the 5 cents an hour increase in minimum wages, which will take place this fall under terms of the act, provided the employers can show that such an increase, from 25 cents an hour to 30 cents an hour, would result in unemployment.

UNDER the "constant wage" plan provided for in the bill, the principle of a penalty for overtime work is preserved, since every hour worked in excess of the maximum in any single work week will have to be paid for by one and one-half hours of time off with pay in some prior or subsequent work week or work weeks. The administrator will have authority to approve the so-called work week plans and is expected to require that such plans must provide fixed settlement dates, upon which all overtime earned to that date, but remaining unpaid in the form of time and a half off, will have to be settled.

A special committee of the United States Independent Telephone Association, which has been very active in urging relief for the small telephone companies from the burdens of provisions of the Fair Labor Standards Act of 1938, is not at all satisfied with Mrs.

Norton's amendment on that subject. This committee originally sponsored bills which would have exempted telephone exchanges having subscribers up to 1,000. While a smaller maximum might be acceptable to the independent telephone industry, the committee seems to think that the 500 maximum set by Mrs. Norton is too small to give the necessary relief.

Again, there seems to be some disappointment over the method of computing even the 500-subscriber maximum under the proposed Norton bill, which would be computed on an annual peak basis. In other words, if an exchange exceeded 500 subscribers during the calendar year, it would lose out on the exemption. The industry feels that an annual general average would be a more equitable and common sense method of computing whatever maximum exemption might finally be agreed upon.

The present prospect is that the Norton bill will be enacted in its present form in the House after considerable debate over its agricultural exemptions. On the Senate side, however, the independent telephone industry still cherishes hope of further liberalizing the exemption with respect to telephone companies.

* * * *

VARYING slightly from the more widely publicized Bell telephone statistics were the figures on world telephone subscription recently released by the Telecommunications Department of the General Post Office in London. According to this British compilation, the total number of telephones in the world at the end of 1937 was 39,444,000, the highest figure ever recorded by that agency. The following table shows the distribution of telephones in the world at the end of 1936 and 1937, in thousands:

| | *No. of Telephones (1,000)* | |
|---|---|---|
| *Continent* | *1936* | *1937* |
| Europe | 13,455 | 14,344 |
| Asia | 1,740 | 1,897 |
| Africa | 335 | 362 |
| North & Central America | 20,030 | 21,131 |
| South America | 769 | 855 |
| Australasia | 790 | 855 |
| Total world | 37,119 | 39,444 |

These figures were published as part of the monthly statistical summary for March, 1939, issued by the Telecommunications Department.

* * * *

A COMPROMISE agreement between the state of Minnesota and telephone companies was announced on May 2nd, assuring the St. Paul-Minneapolis metropolitan area users of an immediate rate saving of about 12 per cent, and retroactive refunds averaging 25 per cent to June 1, 1936.

The new rate slash becomes effective throughout the twin cities' area June 1st. The reduction amounts to about half of the cut previously ordered by the courts but never put in effect. Refunds apply only to the St. Paul district. Litigation involved in the compromise extended through the past ten years.

St. Paul subscribers will receive refunds totaling $1,700,000. The refunds can be collected in cash or applied as a credit on bills.

The settlement was foreshadowed in a Minnesota Supreme Court decision which in February upheld Judge Gustavus Loevinger of Ramsey county district court. He had upheld the state railroad and warehouse commission which began the fight for lower St. Paul rates in 1929.

The commission announced the "compromise" schedule would mean a saving of about $1,000,000 annually to phone users in the twin cities.

The Tri-State Telephone & Telegraph Company in St. Paul and the Northwestern Bell Telephone Company in Minneapolis accepted the new schedule laid down by the commission, while the utility company in St. Paul simultaneously entered into a stipulation with Attorney General J. A. A. Burnquist, agreeing to abandon its court fight against the rate cuts.

* * * *

THE Federal Communications Commission recently advised Representative Magnuson it would coöperate to the limit of its authority in an investigation of a proposed telephone rate increase in the state of Washington.

The legislature has provided $300,000 for a study of the rate proposal, which Magnuson said had "taken on a political flavor." Magnuson said the commission told him it was its desire to coöperate with all state commissions in the maintenance of as nearly uniform reasonable rates as possible throughout the United States.

* * * *

THE United States Court of Appeals for the District of Columbia on May 6th denied, in a brief opinion, the petition of the Federal Communications Commission for a rehearing in the case of the Pottsville Broadcasting Company for a new radio station at Pottsville, Pa.

The decision, considered adverse to the commission's authority to administer the radio broadcast provisions of the Communications Act, was held to be of such far-reaching importance that William J. Dempsey, general counsel of the commission, announced that a petition would be filed with the Supreme Court of the United States for a writ of certiorari.

It is the contention of the commission that the local court's original decision strikes at its administration of the law, alleging that the directions contained in the original opinion are a usurpation of the powers of the executive branch of government by the judiciary.

The Pottsville Company sought a broadcasting license, which was denied, and the case was appealed. During the pendency of this litigation, another firm, the Schuylkill Broadcasting Company, applied for a station in the same town, but the commission withheld action pending the court determination of the Pottsville Case. In the court's original decision on the Pottsville Case, it directed that the commission reconsider the case on the original record in that case.

The regulatory body decided that it was its duty to consider both the Pottsville and Schuylkill cases at the same time, to reach a decision as to which of the two applicants was likely to give the best service in the public interest. This right was denied by the court, which insisted that the Federal commission could only consider the original case on the record made at the original hearing.

* * * *

AN interesting question of telephone rate regulation is likely to be raised in the appeal taken by the Bell Telephone Company of Pennsylvania from a recent judgment of the superior court of Pennsylvania which upheld an order of the Pennsylvania commission reducing intrastate toll telephone rates.

The question involves the issue of whether the state commission can use interstate rates as a level for measuring the reasonableness of intrastate rates for messages over the same lines. The situation resulted from a national long-distance rate reduction order of approximately $12,000,000 a year which was announced by the American Telephone and Telegraph Company in January, 1937. Like several other local affiliates of the Bell system, the Bell Telephone Company of Pennsylvania did not make corresponding reductions in intrastate toll rates.

And so it turned out that intrastate toll rates over Bell lines were higher than interstate joint rates over identical wires of the Bell Company and upon lines of connecting carriers to points outside the state. The Pennsylvania commission decided to remedy this situation and after investigation issued an order on March 15, 1938, requiring the Bell Telephone Company of Pennsylvania to conform all of its long-distance rates to the level established by the AT&T, which meant a reduction on intrastate long-distance telephone rates of about $600,000 a year. The Bell Company appealed and the lower court pointed out that the commission's order was made without supporting evidence as to the value of the property involved or the rate of return that would be produced by the rate order. Hence, the company urged that the commission's order was arbitrary and constituted an interference with interstate commerce.

Commenting on this appeal in one of his regular Washington bulletins to the members of the National Association of Railroad and Utilities Commissioners, John E. Benton, general solicitor of the

state commission group, explained the issue as follows:

> The company relied especially upon the Eubank Case (184 U. S. 27), in which the Kentucky long and short haul law was held unconstitutional as construed to make interstate rates a maximum measure for shorter intrastate rates upon the same lines. If the opinion in that case was applicable, it appeared to be controlling. The court, however, distinguished the cases. In doing so it reviewed recent Federal cases wherein intrastate rates had been required to be raised to bring them into proper relation with interstate rates; and *the court ruled the commission properly applied to the case the provisions of the Pennsylvania statute forbidding any company to receive a greater rate* for the transmission of a "message or conversation *for a shorter than for a longer distance,* over the same line or route . . ." *The appeal of the Bell Company will bring from the supreme court of Pennsylvania, and perhaps ultimately from the Supreme Court of the United States, a decision whether the right* of the Federal government to require intrastate rates to be *raised* to conform to interstate rates, without inquiry as to the reasonableness of such intrastate rates before their increase, *is correlative to a right on the part of a state* to require intrastate rates to be *lowered* to conform to interstate rates, also without inquiry as to the reasonableness of such intrastate rates, except so far as indicated by comparison with existing interstate rates.
>
> *There are some aspects of similarity between this case and Chicago etc. Ry. Co. v. Idaho Commission,* 274 U. S. 344, wherein an order of the Idaho commission, requiring carriers to file reductions in log rates in conformity with findings of the Interstate Commerce Commission, was held arbitrary, and a denial of due process. However, in that case the reduction in interstate rates had not been actually applied to logs by the carriers; and furthermore the decisions of the United States Supreme Court compelling advances in intrastate rates to avoid discrimination, and the seeming necessity of recognizing a correlative obligation as to reductions do not appear to have received the attention of the court. These decisions appear to be the basis of the decision now commented upon. The Idaho Case was decided in 1927 in an opinion by Mr. Justice Butler. Only Justices McReynolds, Butler, and Stone of the present court were then upon the bench. The Eubank Case was decided in 1901. Justices Brewer and Gray dissented then. Much water has gone over the dam since. It may well be doubted whether the Eubank opinion would be written today; and it may perhaps not be considered longer guiding.

Before it is completed the case may also bring forth the suggestion that in the absence of affirmative evidence as to the rate base, rate of return, and so forth, the utility system might raise its interstate rates to conform with the level of intrastate rates, assuming that the Pennsylvania state law is construed as requiring the elimination of any discrimination between the two classes of rates.

* * * *

THE British Broadcasting Corporation on May 8th branded as "entirely erroneous" the *London Daily Mail* story of April 22nd, in which it was reported that on June 7th the British government would take over the British Broadcasting Corporation's network, to be used as a government news agency and as a potential, and to some extent actual, propaganda machine.

Felix Greene, the BBC representative in New York, quoted the British government's denial of the *Daily Mail's* story as follows:

> There is no foundation for the report that the government is contemplating the adoption of any special measures of control over the BBC.

Be that as it may, by mischievous coincidence, on the very same day that this denial appeared in the American papers, an international broadcast of a speech by the Duke of Windsor from Verdun, France, was suppressed throughout England by the British Broadcasting Corporation, although it was carried over both of the American networks of the National Broadcasting Company.

BBC officials, after a hurried meeting, voted not to rebroadcast the speech because they regarded it as untimely, in view of the fact that the King and Queen of England were then on the Atlantic bound on their peace mission to America. However, the report that thousands of British listeners with short-wave sets avidly picked up the international relay of the Duke's speech hardly supported any notion that the BCC suppressed local British broadcasts of the Duke's address on grounds of lack of popular interest. It seemed apparent that the BBC's decision was based on grounds of government policy.

# Financial News and Comment

By OWEN ELY

## *Postal Telegraph & Cable Reorganization*

Following three years of operation by trustees under the Federal Bankruptcy Act, a plan of reorganization was submitted to security holders of the Postal Telegraph & Cable Corp. early this year, and has now been approved by 43 per cent or more of the bondholders. Approval of two-thirds of the bonds and a majority of the publicly held preferred stock of the associated companies is required, tentative court approval having been obtained.

Postal's losses have been incurred in the land lines portion of its business, the cable and radio divisions having been profitable, and the reorganization provides for the breaking up of the company into various components, segregating the profitable from the unprofitable, thereby permitting bondholders to recover something from the profitable divisions while keeping the domestic telegraph business alive pending future developments.

It is proposed under the reorganization plan to set up four new companies as follows: (1) Postal Telegraph System, Inc., to acquire the land line properties; (2) Commercial Mackay Corporation, to acquire the cable and radio systems; (3) All America Sara Corporation, to acquire All America Cables, Inc., and Sociedad Anonima Radio Argentina (Sara) now owned by International Telephone; and (4) New Cable & Radio Corporation, a holding company which will acquire the common stocks of Commercial Mackay and All America Sara and will be operated by IT&T.

Holders of Postal bonds are entitled to receive the following for each bond:

$40 cash.
5 shares Postal Telegraph system 4% non-cum. preferred.
$160 Commercial Mackay Corp. 4% income debenture due 1969, with warrant to purchase 18.4 shares of New Cable & Radio Corporation at $8.70 for ten years (with restrictions).
$20 All America Sara Corp. 4% income debentures due 1969.
20 shares New Cable & Radio Corporation.

It is, of course, difficult to appraise the outlook for all of these companies, their potential earning power, and the intrinsic value of the new securities. Postal's losses have been in the land lines where it competes with Western Union, and the telegraph business as a whole has been adversely affected by higher wage costs, social security and minimum wage legislation, increased taxes, and loss of business to the long-lines division of American Telephone, including the teletype.

The White Act forbids merger of Western Union and Postal, and it may be assumed that Western Union has remained hopeful that Postal's land system would have to be abandoned. Under the proposed set-up, however, with the land lines to be reorganized without funded debt, Postal may be able to break about even before depreciation charges and continue operations indefinitely, since it will start off with a good cash position. This may persuade Western Union to make an attractive offer to Postal security holders, with the object of acquiring and scrapping the Postal lines. If Congress' consent were obtainable and a merger deal could be

worked out, Western Union could probably increase its gross business by $20,000,000 to $25,000,000 (compared with present gross of about $100,000,000), of which a large amount could doubtless be carried through to net income, since the Western Union plant could easily handle the increased volume.

What price Western Union would pay for Postal's business and in what form it would pay would have to be the subject of negotiations, but it is thought that a price of at least $20,000,000 would be paid, and probably more, and this might possibly take the form of new Western Union preferred stock created for the purpose. If $20,000,000 of 5 per cent preferred were paid, it is obvious that such a preferred stock would have considerable investment merit, as a merger might add at least $15,000,000 to Western Union's net, which would mean that preferred dividend requirements should be covered many times over. The $20,000,000 price might be equivalent to a market price for present Postal bonds of several times the current price (about 8½ after allowing for the proposed cash payment), if we include the approximate potential value of other securities (plus cash) to be received under the plan. By the same token, Western Union bonds and stocks may also have substantial appreciation possibilities.

A merger of Western Union and Postal would, of course, involve the creation of a monopoly in the domestic telegraph business, but inasmuch as full government machinery for regulation is already in existence, it would appear to involve no detriment to the public interest. It is also believed likely that Washington is fully resigned to the fact that such a monopoly is inevitable and that no objections will be interposed. It is understood that members of the reorganization committee have conferred with various officials in Washington, including influential members of Congress, and that they have been assured that after fact-finding hearings have been held, enabling legislation will be introduced which should be enacted without opposition. Also, labor is apparently reconciled to the inevitability of such a step. Postal employees are organized in a CIO union (Western Union employees have an independent union) and leaders of the former seem to have been educated to the fact that if a merger takes place, there is some chance for the survival of the present Postal employees' union in an abbreviated form; otherwise, it would probably pass from the scene completely. The Postal employees' publication, edited by union officials, at least takes this stand. Therefore, while a merger may be some time in the future, possibilities for its ultimate accomplishment seem better than in years past when both companies were operating on a profitable basis.

## *New York Traction Merger Plans Nearing Completion*

THE New York City Board of Estimate has tentatively approved the city's plan for acquiring the Brooklyn-Manhattan Transit system, which had been worked out by the transit commission with the approval of the committee on unification; and hearings are now beginning before the commission. However, the broad question still remains as to whether bondholders will consent to take less than par for their holdings, leaving some equity for common stockholders, in return for voting approval by the latter. (The final plan must be approved

| | *June, 1936 Seabury-Berle Plan* | *May, 1937 Transit Com. Counsel's Plan* | *April, 1939 Final Plan* | *Recent Market Price* |
|---|---|---|---|---|
| B.-M. T. coll. bonds. ..... | 100 | 100 | 95 | 78* |
| B.-M. T. preferred ..... | 100 | 100 | 65 | 40 |
| B.-M. T. common ..... | 55 | 34 | 26 (est.) | 11 |

*B.-M. T. 4½s of 1966.

by two-thirds majority of the various classes of securities.) Of the $175,000,000 purchase price, $138,000,000 is allocated to B.-M. T. Rapid Transit divisions and $27,000,000 to B. & Q. T. surface divisions. Assets valued at $11,727,000 are to be retained by the companies, including chiefly cash, securities, and real estate. From the value of these assets an estimated $4,500,000 must be deducted to cover legal and other expenses. Allocations to securities outstanding are as follows:

| | | |
|---|---|---|
| $108,000,000 | B.-M. T. term. and serial bonds at 95 | $102,600,000 |
| 22,151,000 | Brooklyn Union Elev. R. R. and Kings County Elev. R. R. bonds at 95 | 21,043,450 |
| 249,468 shs. | B.-M. T. preferred stock at 65 | 16,215,420 |
| 3,000,000 | B. Q. T. 3½% notes at 95 | 2,850,000 |
| 1,409,000 | B. Q. C. & S. first 5s at 58 | 817,220 |
| 2,703,000 | B. Q. C. & S. consolidated 5s at 50 | 1,351,500 |
| 5,700,000 | Brooklyn City consolidated 5s at 83 | 4,731,000 |
| 1,850,000 | B. C. & Newtown 5s at 75 | 1,387,500 |
| 1,902,000 | Coney Island & Brooklyn Consol. 4s at 62 | 1,179,240 |
| 660,000 | Nassau Electric Railway first 5s at 95 | 627,000 |
| 10,302,000 | Nassau consolidated 4s at 57 | 5,872,140 |
| 283,250 shs. | B. Q. T. preferred at 20 | 5,665,000 |

At different times in the past, the transit commission and the Seabury-Berle Committee have set up values to be recognized for the various securities providing for payment of par value of securities and/or cash (surface-line and underlying bonds were to be assumed by the city). If the bonds then offered in exchange were worth around par (which seems doubtful), the values formerly offered compare with the present plan and current market values approximately as shown in table, p. 676.

If a considerable percentage of the bondholders hold out for par or the redemption prices above par, the stockholders would, of course, have to be content with a smaller share of the remaining cash or equity, which doubtless explains current prices in relation to those indicated in the latest plan. The present market discount on the bonds doubtless reflects skepticism as to final success of the plan, as the New York city long-term 3s now offered by the city administration are almost as good as cash under present market conditions.

It is reported that a general proposal for purchase of the I. R. T.-Manhattan properties, now under Federal receivership, will be disclosed in the near future. The same committee (city representatives and the transit commission) which completed the B.-M. T. plan is at work on the new proposals. The maximum amount of city bonds, cash, or combined bonds and cash, that the city can pay for the Interborough-Manhattan properties is estimated at about $140,000,000 because the B.-M. T. proposal has already earmarked $175,000,000 of the $315,000,000 the city may spend for unification purposes outside its constitutional debt limit. Because of the receivership status and complex intercompany relationships in the Interborough system, its plan may not have as ready an acceptance as that of the B.-M. T. However, the city is in stronger bargaining position with Interborough since it can, if necessary, go to the United States District Court with a definite price and ask the court for a clear title, if security holders cannot agree among themselves regarding a fair allocation of the purchase price.

## *Private v. Government Utilities —Rates v. Earnings*

A REPORT on "Rates, Taxes, and Consumer Savings — Publicly and Privately Owned Electric Utilities" was issued recently by the Federal Power Commission, and commented on in "The March of Events" in the April 13th FORTNIGHTLY (page 496). The seeming object of this detailed report was to show that electric rates average lower

for publicly owned than for private companies.

The commission's study of typical net bills (over-all United States figures, pages 56-7 of report), which we here designate for convenience merely as small, medium, and large, indicated that customers of the publicly owned utilities enjoyed approximately lower rates for equal current by the following percentages as of January 1, 1937:

| | *Small Bills* | *Medium Bills* | *Large Bills* |
|---|---|---|---|
| Residential serv. | 8% | 8% | 4% |
| Commercial lt. serv. | 15 | 17 | 21 |
| Commercial pr. serv. | 25 | 29 | 27 |
| Industrial pr. serv. | 15 | 23 | 23 |

While it is impossible to obtain a combined average figure for all services, residential is, of course, more important from a revenue standpoint than the other classes of service.

As a corollary to its rate statistics, it was decided by the FPC to dispose of the argument that many publicly owned plants pay very little in taxes, enjoy lower capital costs, free supervision, etc. The commission, as indicated in the accompanying chart, purported to show that in 1936 public utilities made "net cash contributions" to government agencies, together with taxes and estimated "free service," to the extent of 26.8 per cent of their base revenues, while the corresponding total for private utilities was only 14.4 per cent. "Thus," as the commission states, "the combined percentage in case of publicly owned electric utilities is almost double that for privately owned electric utilities."

Such a method of comparison might be open to some question, since the cash contributions to municipalities or other governmental divisions made by publicly owned utilities are perhaps somewhat comparable to the return on capital made by the privately owned companies to their security holders.

For a test of operating efficiency, one method of approach would be to compare the operating ratios of the two groups. According to the 1937 U. S. Census of the Electric Light and Power Industry, the total operating revenues of the private electric industry were given at $2,207,108,652; total operating expenses (including depreciation but not taxes), as $1,164,072,484. The revenue of municipal electric plants was recorded as $154,976,216 against operating expenses of $97,267,682 (also including depreciation).

According to these figures, the operating expenses of the private industry work out at 53 per cent of operating revenue as compared with the 63 per cent ratio for the municipal plants. It would appear, therefore, that municipal plant rates would have to be increased about 19 per cent to produce the same operating ratio as for the private companies—this does not allow for the lower administrative costs enjoyed by many municipal plants due to combination with other municipal functions, office facilities, etc.

The 1937 census figures for the private electric industry, however, differ from the preliminary figures compiled by the Edison Electric Institute, which exclude intercompany transactions. The latter figures would indicate an operating ratio of 48 per cent (instead of 53 per cent), as compared with 63 per cent for the municipal companies as above—which would mean an increase of about 31 per cent in rates required to place private and public companies on a similar operating ratio basis.

It is difficult to set up an accurate comparison for the year 1936, but some approximate results are perhaps obtainable. According to the FPC estimate of taxes, cash contributions, and free services, the publicly owned companies in that year had an operating ratio (including depreciation) of about 73 per cent, though this does not allow for interest paid, which, it is estimated, might reduce the figure to about 67 per cent.

While these comparisons are inconclusive because of complications resulting from statistical compilation, they do suggest either (1) that private utilities have a better record of operating efficiency, all other things being equal, or (2) that the lower average rates charged by publicly owned utilities are not yield-

ing a fair rate of return on the capital invested. This is an obvious probability in the case of more recent municipal plants constructed with PWA subsidies.

## *Corporate News*

PRESIDENT Phillips of the Philadelphia Company has announced that an agreement has been reached with the Federal government for a $7,328,915 settlement of tax claims against the company and its subsidiaries.

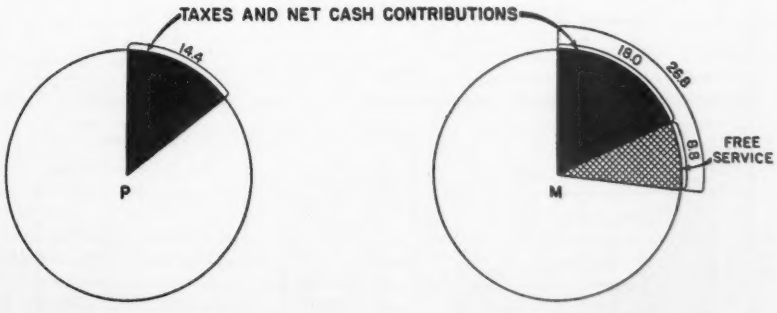
The SEC has taken under advisement the question whether the 7 per cent bonds of the Societa Adriatica di Electricita, important Italian electric holding company, should be suspended or withdrawn from registration on the New York Stock Exchange, for failing to file adequate information.

Stockholders of Cities Service Company, at their annual meeting, authorized the company to pledge all the common stock and an undivided 10 per cent interest in the preferred stock of Cities Service Power & Light Company as security for all outstanding debentures of Cities Service. Voting rights on the stocks are to be vested in the trustees. This is part of the program by which Cities Service Company, whose major interests are in the oil industry, expects to obtain exemption under the Public Utility Holding Company Act.

Public Service Corporation of New Jersey has, according to press reports, been negotiating with officials of Associated Gas and Electric Company for outright purchase of Associated's common stock interest in Jersey Central Power & Light Company. It is reported that the price is around $13,500,000. Associated is said to be in need of the cash for current corporate requirements and for construction. In view of the negotiations, the sale at public auction of the 712,411 shares held as collateral by the New York Trust Company, as trustee, which was scheduled for May 3rd, is likely to be postponed to July 12th.

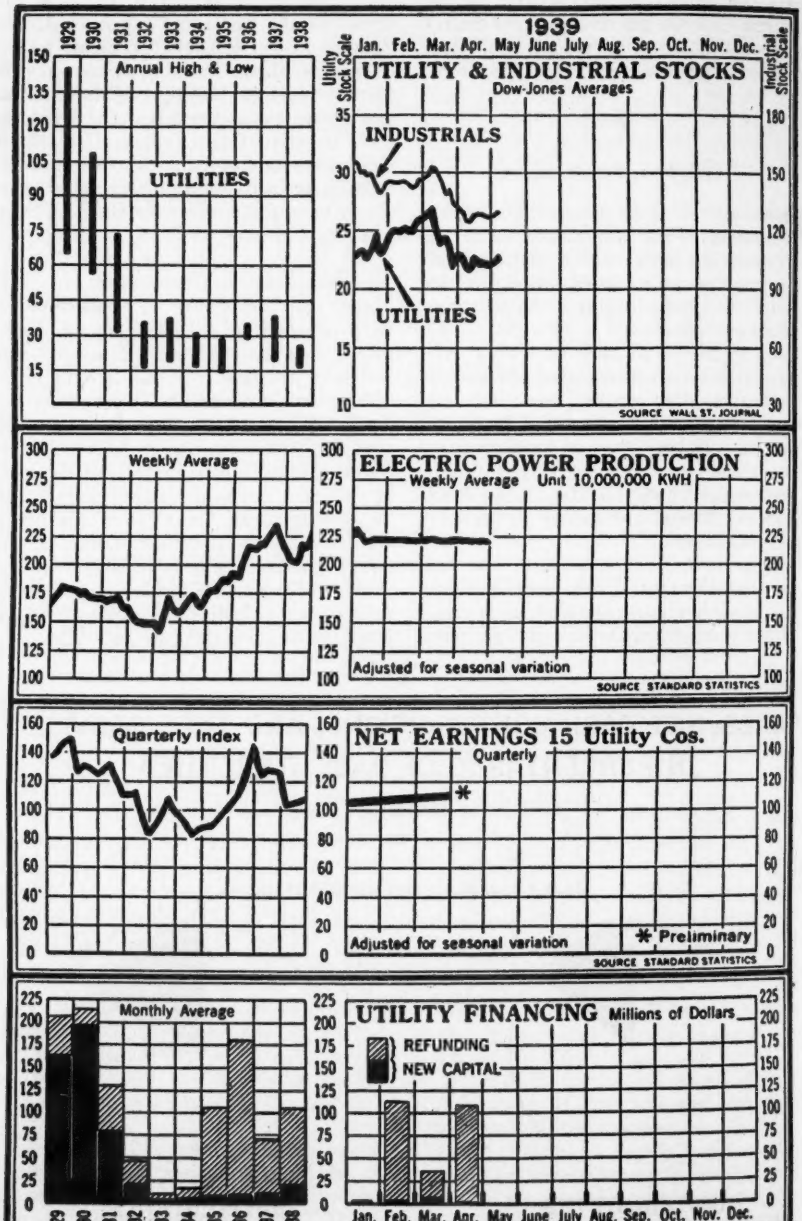
**TAXES, NET CASH CONTRIBUTIONS, AND FREE SERVICE IN PERCENTAGES OF BASE REVENUES**

**1936**




UNITED STATES
691 PRIVATELY OWNED UTILITIES

UNITED STATES
537 PUBLICLY OWNED UTILITIES


1929 1930 1931 1932 1933 1934 1935 1936 1937 1938
Annual High & Low
UTILITIES
1939
Jan. Feb. Mar. Apr. May June July Aug. Sep. Oct. Nov. Dec.
Utility Stock Scale
Industrial Stock Scale
UTILITY & INDUSTRIAL STOCKS
Dow-Jones Averages
INDUSTRIALS
UTILITIES
SOURCE WALL ST. JOURNAL
Weekly Average
ELECTRIC POWER PRODUCTION
Weekly Average Unit 10,000,000 KWH
Adjusted for seasonal variation
SOURCE STANDARD STATISTICS
Quarterly Index
NET EARNINGS 15 Utility Cos.
Quarterly
Adjusted for seasonal variation
* Preliminary
SOURCE STANDARD STATISTICS
Monthly Average
UTILITY FINANCING Millions of Dollars
REFUNDING
NEW CAPITAL
Jan. Feb. Mar. Apr. May June July Aug. Sep. Oct. Nov. Dec.
1939
SOURCE FINANCIAL CHRONICLE

# What Others Think

## Chamber Committee Considers Natural Resources

AMONG the sectional sessions of the recent convention of the United States Chamber of Commerce in Washington, D. C., was a meeting of utility interest of the chamber's "Committee on Natural Resources." The session was presided over by James F. Owens, president of the Oklahoma Gas & Electric Company, who pointed out that behind the system of American enterprise, labor, capital, and management, is power—more developed mechanical power than anywhere in the world. Coal, petroleum, gas, and electric energy all play a part in keeping the wheels of industry moving, and he observed that the principal speakers would deal with all four of these resources.

Mr. Owens recalled that the chamber's natural resources department had recommended a 5-point program to accelerate business activity: (1) Abandonment of government competition with electric utilities; (2) abandonment of Federal subsidy for the construction of local public power enterprises; (3) encouragement of legally recognized sales agencies for the bituminous coal industry; (4) the limitation of excessive regulation which might interfere with the splendid progress in the discovery and development of petroleum resources; (5) the maintenance of fair competition between competing forms of energy supply through proper legal restraints and conservation laws.

The first scheduled speaker of the session was L. R. King, president of the Iowa-Nebraska Light and Power Company, who spoke on "The Electric Utility's Opportunity." Mr. King's remarks were mostly extemporaneous and were based upon several statistical charts which he had brought with him to the meeting. These charts generally were designed to indicate that there is need for expansion in electric utility facilities and a sound economic basis for the same.

SPECIFICALLY, Mr. King's charts showed that from 1929 to 1938 the electric utility industry's capitalization increased 20 per cent and its production 32 per cent, but its revenues only 11 per cent. From 1926 to 1938, per customer domestic consumption of electricity had increased from 426 kilowatt hours to 850 kilowatt hours a year. In other words, per customer usage just about doubled during those twelve years. The average annual bill, however, had increased only 19 per cent. Thus we have customer usage increasing five times more than customer revenue.

This resulted, of course, from the sharp reductions in electric rates. The average rate per kilowatt hour of 6.9 cents dropped to 4.2 cents—a cut of about 40 per cent. Summarizing these trends over the period from 1926 to 1938, Mr. King observed that the average domestic electric consumer almost doubled his usage, but his annual bill increased only 19 per cent because rates had been reduced 40 per cent.

In the face of such obvious trends toward more and more consumption per customer, the speaker emphasized the need for additional expenditures to increase power reserves and take care of necessary plant replacements. Yet the records of the industry show that while in 1930 the electric utility industry invested $961,000,000 in new plant, by 1933 this type of investment had dropped to a mere $129,000,000. By 1938-39 it had risen again to about one-half billion.

Mr. King emphasized the future of the electric industry as a sound financial investment and referred to the fact that

18 per cent of all insurance company investments were in utility bonds. What the industry needs, he said, is boosting spells, not breathing spells.

FRANK Phillips, of the Phillips Petroleum Company, read the second paper of the session on the subject of petroleum and its inseparable twin industry, natural gas. Because of its adaptability and low cost, petroleum is supplying an increasing share of the nation's energy requirements. Some of this increase represents a shift from other sources of energy, but most of it must be attributed to new forms of transportation, and to new industrial applications in general. The speaker pointed to the increasing importance of the petroleum industry as an employer of capital and labor, as a taxpayer, and as a social and economic force. With a capital investment of approximately $15,000,000,000, it is the fourth largest industry in the country. The ratio of capital employed to the number of employees is high, averaging around $2,400 per employee for Mr. Phillips' own company.

The petroleum industry employs a million workers with an annual payroll of a billion and a half, which provides for the most part steady, year-round employment. Oil is the nation's largest source of taxes and now yields more than $1,200,000,000 a year to Federal and local governments. The taxes paid by Mr. Phillips' company alone exceed by more than $7,000,000 the combined amounts paid as wages to employees and as dividends to stockholders.

The speaker referred to scientific improvements in the discovery and exploitation of petroleum and the improved quality of its refinement and diverse by-products. He answered the inevitable question as to how long the oil supply would last, saying that there is "no reason to worry about our future supply if it is conserved." He declined to venture any specific prediction in terms of years. This is probably due to Mr. Phillips' faith in discovery of new reserves. He stated on this point:

> With future progress in the field of science it is reasonable to expect the discovery of additional reserves as the search for oil continues. I firmly believe that oil will eventually be found in every state in the Union, with the exception of those states in mountainous areas where the basic granites of the earth rise to the surface and no sedimentary layers are present.
>
> In the past, only 25 to 40 per cent of the oil in the pools has been recovered due to inefficient producing methods which permitted the wasteful exhaustion of gas, leaving no pressure to move the oil through the oil sands to the bottom of the well. With present knowledge of underground structures and our modern equipment, it is possible to increase this recovery through the application of proper drilling and producing methods. Control of well spacing and rate of flow, with maintenance of gas pressures, will not only increase the amount of recoverable oil, but by prolonging the natural flow of wells will reduce lifting costs.

THE speaker stated his opinion that coöperative Federal law would be necessary to bring about needed conservation and regulation, although he conceded that much has been accomplished in promoting conservation by the present compact of six oil-producing states. He suggested a modification of our "antiquated anti-Sherman Trust Law" so as to allow the oil industry, through constructive coöperation, to curb the damaging influence of unbusinesslike competitive practices.

James D. Francis, president of the Island Creek Coal Company, of Huntington, W. Va., was the third scheduled speaker before the natural resources session, but by reason of an unavoidable absence his paper was read by R. E. Howe, president of Appalachian Coals, Inc. Mr. Francis led off with a striking quotation of a noted California scientist, Dr. R. A. Millikan: "The primary reason for the profound change in man's physical world in the past 150 years has been the discovery and utilization of the means by which heat energy can be made to do man's work for him. . . . Coal, oil, and water are now the major sources of cheap power and will continue for thousands of years, . . . although oil will perhaps be gone in fifty years, coal will last for another millennium."


*The Knoxville Journal*

NOT CONFINED TO EUROPE

Mr. Francis said the coal industry looks forward, not to the death of the competitive petroleum industry by way of exhausted reserves, but "to the time when the wonderful research department of the petroleum industry will remove this irreplaceable product as a serious competitor of coal by making it more valuable and useful to their industry and to the nation as a whole."

He observed that well-known chemical properties of coal and petroleum are similar and produce many of the same by-products. Some of the latest by-products seem little short of magic, such as the recently developed process for making silk from coal. Mr. Francis' paper continued:

> America owns and controls the major portion of the world's bituminous coal reserves, with an amount sufficient to last this nation, on the basis of the last ten years' use, for more than three thousand years. These reserves are known; no discovery is needed. They are located in more than half of our states, and our nation's transportation systems have been built in centers where these coal supplies are easily available. No nation during the past half century has had as abundant a supply of cheap heat and power

as that furnished by the bituminous coal industry of this country. It is, next to agriculture, the most important basic industry and without it our agricultural development to its present high state would never have taken place. It is of the highest importance to both the nation and the coal industry that it maintain its record of furnishing the industry of tomorrow with a steady and unfailing supply of efficient heat and power at a low cost. The coal industry recognizes that it must, like other industries, work for volume of production, expanded uses so that the entire public can benefit thereby, and that no monopoly or monopolistic development is for the ultimate benefit of the industry. The industry recognizes that while research is beneficial to it and the nation, yet for many years to come, even though thousands of uses may be found for coal and its by-products, coal must and will primarily be used to furnish the nation power for its factories and transportation and heat for its citizens and its homes, and the proportion of the product that will be used for the chemical industry will be relatively small in total tonnage. The cost of the coal that goes into your factory or your home is from one-third to one-half the cost of similar coal in any other nation in the world. This, in spite of the fact that the wages paid labor in producing it in this country are more than double the wages paid on the average throughout the rest of the world.

THE speaker referred to the large usage made of coal by the various industries, such as the electric power industry, and by domestic consumers. He added, however, that "capacity and development of the present mines are beyond the immediate needs of the public, and while the industry has served the public well and efficiently, it has not served itself well or wisely, and during the past twenty years its average record has been one of tremendous losses." As a corrective measure he suggested physical consolidation of coal properties, under well-financed management, which would give the industry substantially larger units. At present the largest coal company produces less than 3 per cent of the total national production. There are no large companies in the bituminous coal industry comparable with other industries.

Mr. Francis also deplored the experimentation in government regulation which resulted in the setting up of the National Bituminous Coal Commission to function as a sort of one-industry NRA. He stated that the restrictions which have resulted in the past five years have produced the most unprofitable period in many decades. He compared the more satisfactory experience of the British coal industry, which does not have any such system of government regulation. The paper was concluded with an appeal for more equitable transportation railroad rates for the coal industry.

## A Coal Man Complains of Federal Competition With Private Industry

CHARACTERIZING Federal competition with private industry as "unshirted hell," C. B. Huntress, of New York city, recently warned members of the Missouri Association of Public Utilities, at their annual convention in Kansas City, that "there was a determined drive on the part of Washington and its labor allies to nationalize the coal mines." Mr. Huntress is eastern sales manager of the Republic Coal & Coke Company, Chicago, and former executive secretary of the National Coal Association. He said:

> Now is the time for liberal minds to protect the people against big government, as that courageous leader of your industry, who has borne the brunt not only of your battles but, in a larger sense, of the far-reaching struggle to preserve liberty, Wendell L. Willkie, asserted some months ago.

The speaker cited the recent history of the coal industry, "to shed light on the present dilemma," stating, "There is wonderment why so many coal producers let themselves in for such a hoax as the Guffey price-fixing measure, which economic monstrosity could not have become a law, even with the backing of

labor and the White House, had not many coal operators endorsed the scheme. Lenin must have had in mind the genus represented by a number of them when he remarked that immediate profit was sure-fire bait for capitalism. Several large producers commented, when the first Guffey bill was before the Congress, that they were unable to 'figure out how any operator could be so dumb as to oppose the bill,' which John L. Lewis was then publicizing as 'that wonderful gift of our President.' 'Why,' they chortled, in anticipation of quick profits through fancy prices, 'we realize it can't last long, but we'll make so much while it does, that we can retire.' They sold their birthright for a mess of pottage and didn't even get the pottage."

Mr. Huntress continued:

> Since the first Guffey measure was passed by the Congress, nearly four years ago, an act which was thrown out by the Supreme Court in May, 1936, there have been two other similar measures. The first failed of passage in June, 1936, and the second became a statute ten months later. In that entire period of forty-four months, prices have been effective only seventy-two days, from December 16, 1937, to February 26, 1938, when the commission itself threw them out. The plants which some of you men operate would have been switched from coal to natural gas, had Guffey prices stuck, and will be switched, I predict, if, as, and when Guffey prices come back for any length of time. Against the possibility of promulgation of exorbitant Guffey prices, one electric utility a few weeks ago purchased 8,000 acres, containing 30,000,000 tons of coal, from which to mine its own annual requirements, exceeding a million tons. Consumer-owned properties are not subject to Guffey price control. Consequently, reinstatement of prices for any substantial period would provoke many consumers to similar action, resulting in abandonment of scores of commercial mines, due to loss of their market for steam sizes.
>
> The coal and electric utility industries have been the popular targets of the Federal sharpshooters for some time. Respecting coal, the strategy of bringing it into the charmed circle of the planned society is, first, through price-fixing and, second, through depriving it of a vital market for its steam sizes, by substitution of subsidized hydroelectric power. Of government purchase of those coal operations which can wangle through to the completion of the Federal power program, the Secretary of Interior is in favor, according to a statement he made to me in 1934. Coal asks no favors, but rightfully remonstrates against government subsidy to another energy source. I have no truck or patience with that school of thought which, because there is a law designed to hamstring coal, would enslave natural gas and oil with political shackles.
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> . . .
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> The coal industry stands to lose a market of over a hundred million tons, due to competition from the pretentious power program. Should such a market for steam sizes be taken away from the industry, Mr. Ickes could name his own price for the remaining properties. Displacement of one hundred million tons would throw 150,000 miners and railroad men on the bread lines, along with more than half a million dependents. Federal power plans could not have gained such headway had not John L. Lewis, head of the miners' union, calculated that the politic way to promote the Guffey price-fixing proposal was to cease opposition to the power scheme. It was a simple deal. Labor okehed the dams, thereby signing a death warrant for many mines, in return for active presidential support of price fixing, which dovetailed perfectly into the notions of the commissars of a planned society. That reprehensible transaction, a sell-out of labor, is responsible for the present building of dams and closing of mines.

MR. Huntress conceded that he did not have any definite or fool proof plan whereby the coal industry could obtain economic salvation. But he ventured the general suggestion that the industry needs more orders from customers and less orders from the government. He observed that many operators forsook the regional sales agency plan, which is approved by the United States Supreme Court as a reasonable method of industrial control, for the fool's paradise of Federal regimentation. He concluded, however, that it was idle for the industry to expect a permanent solution of its problems by legislative fiat.

FEDERAL COMPETITION—GANGWAY FOR PRIVATE ENTERPRISE. Address by C. B. Huntress at annual convention of Missouri Association of Public Utilities. Kansas City, Mo. April 14, 1939.

# Will the Nebraska Power Projects Pay Out?

WHAT appears to be a most factual description of the controversial public power district set-up in Nebraska is to be found in a 2-instalment series of articles appearing in the *Engineering News-Record,* by the managing editor of that publication, V. T. Boughton. Of more general interest is the first of these discussing the general character of the Nebraska projects and the present indications as to power markets, which Mr. Boughton wrote as a result of a first-hand study of the two Nebraska projects now in operation and one still under construction.

The second article takes up the more technical problems of the engineering and construction of all three projects.

It has been five years since Nebraska began the public development of the state's water-power resources with money from the PWA. To date the Federal government has made commitments of about $60,000,000 to the three public power and irrigation districts: Platte Valley, Central Nebraska, and the Loup River district. Local people have contributed about $20,000 for promotional work.

Widely characterized as Nebraska's "little TVA," these public projects have been the subject of much adverse comment. Total costs have been declared so high as to put the unit cost of power and irrigation water beyond reason. Again, the question has been raised as to the amount of firm power that can be produced because of the uncertainty of the water supply. Potential power markets have been criticized and operating difficulties to date have been the cause of conflicting interpretation.

Mr. Boughton finds that in addition to the opposition of private power companies, local municipalities and established irrigation farmers have looked askance at the proposed state-owned power monopoly set-up. He stated:

> Quite naturally, the privately owned power companies are opposed to the projects, but it is rather surprising to find the power companies supported by town officials in communities having municipally owned power plants. The reason for this is found in the fact that the relatively high rates charged by these plants bring in a tidy income which carries a large part of the municipal expenses, and the town officials see in the public power districts a move to confine surpluses to a general reduction in domestic rates.

THE author then goes into a description of the physical construction problems which confronted the builders of the Nebraska hydro districts. It appears that the flow of the Platte river is uncertain and storage is difficult to obtain because the river bottoms are wide and the underlying material porous.

The general topography of the country is relatively flat and the only way in which a "head" for power development can be obtained is through the use of long canals leading water out of the bottom lands into hills and then carried downstream many miles to some point where the river swings close enough to the hills to permit the water to be returned to the river channel through a power plant. To do this requires long canals through sandy soil and calls for superstructures to take care of cross drainage.

The problem of water storage is complicated by the fact that the U. S. Reclamation Bureau is now beginning to store water behind the Seminoe dam near Casper, Wyoming, which may affect the flow of the North Platte. On the other hand, the Colorado-Big Thompson project, now under construction to divert water from the headwaters of the Colorado into the Platte valley, should add to the water supply.

Mr. Boughton describes the progress and capacity of the power installation of the various projects and the development of power markets so far. He concludes:

> From the economic angle, it would probably be easy to show that for the total investment—including both PWA grants and loans—these projects never can pay on a purely bookkeeping basis. But it must be recognized that they were undertaken as part of the nation's great program of creating


*The Progressive*

POWER!

employment through the construction of useful projects, and that as such they have created a large amount of continuous employment for a great many people. And having been carried out by normal methods as undertakings of the public power districts, the work being let out by contract under the supervision of regular engineering forces, rather than as relief operations, the employment created has been altogether normal in character. And one cannot traverse the area in which this work has been carried out without seeing on every hand the evidence of intangible benefits which cannot be easily evaluated on a dollars and cents basis.

MR. Boughton believes that by charging PWA grants to intangibles, there is some evidence that income from the power developments and the sale of irrigation water will repay the loans from the Federal government. He

added the reminder that government subsidies do not bring Nebraska power costs down to the point where districts can take very much business away from private companies in active competition. This means that the success of the public power developments would appear to rest on the ability of the districts to build new business. The author concluded:

> Looking upon these Nebraska projects as pioneering attempts to promote and coördinate the development of natural resources as public undertakings, little can be found to criticize and much will be found to commend. Though fostered by Federal aid, their major virtue lies in the fact that they are essentially local in character; unmistakable evidence of the willingness on the part of local people to risk something in the development of the region in which they live.

Mr. Boughton referred to the recent attempts to negotiate purchase by the districts of the existing distribution facilities of practically all privately owned electric companies in the state. He blamed the collapse of these negotiations on the uncertainty as to what the state legislature in Nebraska would do about proposals to subject the districts to taxation and local rate regulation. The author implies that if these uncertainties can be resolved satisfactorily, the purchase negotiations to establish a state power monopoly in Nebraska may be revived.

—F. X. W.

WATER POWER IN NEBRASKA. By V. T. Boughton. *Engineering News-Record.* April 27, 1939.

## Bouquets for the Administration's Power Policy

PUBLIC power development under the administrative policy of the New Deal was the major theme of most of the speakers at a recent banquet held in Washington, D. C., to celebrate the twenty-fifth anniversary of the National Popular Government League. The dinner was attended by more than 500 of the New Deal's top-flight liberals from virtually every branch of the administration's service.

Especially honored at the silver anniversary dinner were four of the league's founders: Senator George W. Norris, of Nebraska; former Senator Robert L. Owen, of Oklahoma; Edward Keating, editor of *Labor,* who acted as toast master; and Judson King, director of the league and its guiding force for the entire period of its existence.

President Roosevelt, although staying at the time at his home in Hyde Park, N. Y., sent the league a congratulatory message which sounded the keynote of most of the oratorical display. Recalling the interest of the league in the Federal government's power policy, he said that electric power was of such great importance in modern civilization that "it cannot be allowed to rest uncontrolled in the hands of a few any more than all the land and waters of the earth can be."

The President added that the cost to the consumer of utilities had been reduced in the past six years while at the same time every electric utility had made "a fair return on the cash investment in its properties — excluding, of course, watered stock and inflated values."

"These are no little things in themselves," he added, "and they are indicative of still bigger things: the use of the people's government in the people's interest, the interest of all the people."

THE celebration was climaxed by Norris' plea for a "100-year plan" to conserve the nation's soil and resources against the fight of private utility companies "who cry out against building dams to stop floods and save the soil," since the production of electric power is also involved.

Earlier, Rural Electrification Administrator John M. Carmody argued that democracy had taken a new lease on life through the spread of cheap electricity to rural areas.

Speaking on "the crimes attempted in the name of states' rights," Senator Lis-

ter Hill, Democrat of Alabama, declared that private utilities "throw about them the panoply of patriotism and cry of states' rights when the government seeks to protect the people."

Hill argued:

> The state sovereignty cannot control floods for the very good reason that a flood does not stop at a state line. The Federal government and the Federal government alone can control floods and it necessarily has the power to do the job. . . . The issue is not states' rights—the issue is whether states prefer floods to reservoirs.

Tennessee Valley Authority Member David E. Lilienthal declared that liberal governments die only when they cease to be liberal and that abandonment of an objective to obtain the good will of reactionaries spelled the doom of liberalism.

OTHER speakers were Representative Voorhis, Democrat of California; Paul H. Todd, former chairman of the Michigan Public Utilities Commission, who declared that private utility interests controlled many state legislatures by bribes to state legislators; Federal Communications Commission Chairman Frank R. McNinch, who asked for "an economic as well as a political democracy in which the masses of the people may come into a livable kind of life"; and Mary Anderson, Women's Bureau head, who warned against legislative enactments curbing the right of married women to work.

Messages were read from former Governor Gifford Pinchot, of Pennsylvania; Stuart Chase, economist; William Allen White, editor of the *Emporia Gazette;* Mrs. Edward Costigan, widow of the late Senator from Colorado; Charles A. Beard, noted historian; and Edwin Markham, famous poet.

Among the guest reservations were most of the members of the Federal Power Commission and the Securities and Exchange Commission; the three directors of the Tennessee Valley Authority; Thomas G. Corcoran and Benjamin V. Cohen, special advisers to the White House; the late Frank P. Walsh, chairman of the New York State Power Authority; and numerous other high-ranking officials of the Federal government.

## Notes on Recent Publications

THE MANAGEMENT OF MUNICIPAL PUBLIC WORKS. By Donald C. Stone. Public Administration Service. Chicago, Ill. 1939. 344 pp., including 19-page index. $3.75.

This is a valuable and well-organized handbook on the subject shown in the title. It covers the subject completely, as indicated by the chapter headings which are as follows: Management Essentials; Personnel Administration; Standards and Measurements in Public Works Management; Public Works Planning and Budgeting; General Accounting As It Affects Public Works; Public Works Cost Accounting; Purchasing and Supply Management; Equipment Management and Accounting; Engineering Administration; Public Works Maintenance and Construction; Refuse and Sewage Disposal; Property Management; Public Relations; Social Benefits from Public Works.

These chapters include a discussion of general principles as well as practical data on installations and operations of public works functions in various cities throughout the United States. There are a number of charts to illustrate technical information. The book gives not only examples of effective management in this increasingly complex branch of municipal government but methods for achieving it.

WHY HAS WISCONSIN FORGED AHEAD ELECTRICALLY? Published and distributed by the Wisconsin Utilities Association. Milwaukee, Wisconsin.

This is an interesting little booklet of 30 pages in which 68 questions about the electric utility industry in Wisconsin are answered in a simple manner perfectly understandable to the average layman. Although the questions are mostly of an elementary nature, the answers, together with the charts and illustrations, are obviously based upon careful and accurate research. Reference sources are included.

# The March of Events

## EEI June Program

AN interesting program was seen for the seventh annual convention of the Edison Electric Institute meeting in New York, June 6th to 8th, at the Waldorf-Astoria Hotel. Three general sessions will be held there on each morning of the convention, with a special afternoon session at the New York World's Fair on June 6th.

After the opening address by President C. W. Kellogg, Roy Wenzlick, noted real estate analyst of St. Louis, and Floyd L. Carlisle, chairman of Consolidated Edison Company of New York, will discuss business trends and prospects.

At the second session, H. E. Dexter, of the Central Hudson Gas & Electric Corporation, will speak on rural electrification. General Charles Keller, of Public Utility Engineering & Service Corporation, will discuss national defense, and George E. Whitwell, of the Philadelphia Electric Company, will cover sales promotion and load building.

At the third session, H. P. Liversidge will award the Forbes, McGraw, and Marshall prizes, the Matthews valor awards, the Curtis award, the National Electric Water Heating Council award, and the Charles A. Coffin medal. Other speakers will include Elmo Roper, distribution consultant, George N. Tidd, of the American Gas and Electric Company, and Adam S. Bennion, of the Utah Power & Light Company.

## Changes at Bonneville

FRANK A. Banks, construction engineer of the Grand Coulee dam project, was appointed on May 4th by Secretary of the Interior Harold L. Ickes as acting administrator of the Bonneville project to succeed the late John Delmadge Ross.

Mr. Banks, fifty-seven years old, is a graduate of the University of Maine in civil engineering and has been employed continuously by the Bureau of Reclamation since 1906.

Secretary Ickes also announced the appointment of Barry Dibble, an outstanding electrical engineer whose home is in Redlands, Calif., as assistant administrator of the Bonneville project to work with Mr. Banks and to represent him at the Portland, Ore., project office.

R. W. Beck, engineer for the Bonneville dam administration, on May 7th said he had been dismissed by Secretary of the Interior Ickes. The dismissal followed publication of a letter which Beck declared had been written by the late J. D. Ross, Bonneville administrator, opposing the use of condemnation suits by public utility districts in acquiring properties of private utilities in Oregon and Washington. Beck, who presented the letter for publication to newspapers, said it had not been mailed by Ross, although it had been written last January.

Beck made public an exchange of telegrams in which Ickes reprimanded him for publishing the Ross letter and later announced his dismissal after Beck had stated his intention to continue to advise public utility districts.

## U. S. Flood-control Plan Denounced

GOVERNOR George D. Aiken, of Vermont, on May 4th defended his "state's rights" policy on flood control, declaring that if the Federal government had gained its point in the recent controversy over a dam site at Union Village, Vt., "they would have absolute control over every home and farm in New England—and the rest of the country as well, if this policy is extended unchecked."

Addressing members of the Lions, Rotary, Kiwanis, and Civitans clubs at a joint luncheon, Governor Aiken stated:

"When a government dam is constructed on a small tributary in the upper basin, the supposed beneficiaries of the lower valley might be assessed to pay for the benefits received. Thus, under the guise of flood control, the watersheds of the upper valley might be placed under the jurisdiction of the Federal government and the states of the lower valley assessed to pay the costs of operation."

Defending his own stand in the Union Village controversy, in which he refused to allow the Federal government to seize land for a dam site without the consent of the state, he said:

"Many who know better have spent much time and money to give the public the impression Vermont is championing the cause of private utilities and delaying the cause of flood protection. During my life I have seen utility companies benefit from the inflation of values. I have seen them spend your money and mine in working for selfish ends. I have seen them unload their tax burdens on the breaking backs of those who could scarcely

stand. But I would not destroy the American form of government in order to get even with them."

## TVA Head Renominated

HARCOURT A. Morgan, former president of the University of Tennessee, and now chairman of the Tennessee Valley Authority, late last month was nominated for reappointment to the authority's board by President Roosevelt. The chairman has served on the board since its creation, and was elected chairman after Dr. A. E. Morgan was expelled by the President for "contumacy." His term expired May 18th. If confirmed by the Senate, Chairman Morgan will step into a 9-year term.

Asked to comment on the nomination, the TVA chairman replied that he was "deeply gratified."

## New Utility Commission for British Columbia

FORMATION of the 3-man commission created by British Columbia's new Public Utilities Act to assume the regulation of all public utilities in the province, except those directly under Dominion jurisdiction, was completed recently.

The chairman of the board is Dr. W. A. Carrothers, former university professor, and late chairman of British Columbia's Economic Council. The associate commissioners are Lewis W. Patmore, K. C., who is also a member of the International Fisheries Commission, and Major James C. MacDonald, well-known provincial engineer. The appointments are for ten years, at a yearly salary of $10,000 for the chairman, and $7,500 each for the associate members.

In appointing the board, the government set in motion its plan of public utility control authorized at the last session of the provincial legislature.

Wide powers have been granted the commissioners under the carefully phrased 12,000-word act. In effect the board has been given the right of entry and examination into controlled premises; vested with authority to demand financial, operating, or other information; given the right of appraisal and valuation of company assets, and the authority to order the creation of depreciation and reserve accounts.

It has the power to fix rates, revising downward "unjust and unreasonable rates," and upward "rates insufficient to yield fair compensation." It can command extension or limitation of services, can cancel existing contracts and direct new ones, and it can set standards and compel their maintenance.

The few services excepted include the Greater Vancouver Water District and taxicab drivers plying their own vehicles.

The board will have injunction powers of its own, with the rights and privileges of a supreme court in certain matters. For failure to carry out an order of the board, a utility may be entered forcibly and the property seized for operation by the board while the breach continues. Penalties ranging from $20 to $5,000 are provided for in the act.

Appeals from the commission's orders and decisions may be taken to the appeal court on matters of law and jurisdiction, or to the Provincial Cabinet against rates or other factual orders of the board. If the government decides it cannot settle a point of fact, it may allow the case to go to the courts.

First order of the new board was for the submission of rates and explanatory documents by all public utility companies. Because of the time required for a careful analysis of the utility set-up in the province, actual fixing of rates may be delayed for a year or so, it was reported.

## Power Pact Signed

FRANCE and Germany last month signed an accord regulating questions of sovereignty in connection with the Rhine river dam at Kembs, used for the production of electric power.

The accord delimits the French-German frontier in the neighborhood and provides for joint exploitation of the power facilities by the two countries.

# Alabama

## New REA Rules Fixed

NEW rules for the filing of applications for approval of rural electrification and other projects were announced recently by A. R. Forsyth, director of the state department of finance.

Forsyth said additional details regarding the cost and effect of proposed projects on existing utilities or facilities would be required to "guard against lengthy litigation in the courts after approval of bond issues." One of the new rules sets out:

"In cases where the projects proposed to be constructed with the proceeds of the sale of bonds will duplicate or compete with existing properties, applicants shall file an estimate of the amount of revenue of which existing properties will be deprived; and an estimate of the decrease in taxes which will result from the construction and operation of the project proposed to be financed by the issue of bonds for

which approval or consent is sought."

The finance director pointed out that in several instances bond issues approved by the former State Public Works Board, the functions of which are now carried on by the finance department, have been the subject of lengthy court litigtion brought by private utility companies.

## Bessemer Loses Fight

EFFORTS of the city of Bessemer to condemn private property for a transmission line to serve the city's municipal electric system were forestalled on April 28th, at least temporarily. The state supreme court awarded a writ of mandamus restraining Probate Judge Eugene Hawkins, of Jefferson county, from condemning property for the proposed line.

The decision reversed a ruling of Jefferson Circuit Court, which had refused to restrain Judge Hawkins from rendering a decision in condemnation proceedings against property owned by J. Blach & Sons, Inc., and remanded the case for further action. Reversal was on grounds the city had not contended the proposed transmission line would be constructed "for the purpose of serving the needs of its citizens," which was termed a fatal error.

The Blach Company's contention, upheld by the state supreme court, was that "the probate court was without authority or exceeding its jurisdiction to condemn the land in question because the city of Bessemer did not, by its petition, charge or show the right or authority to condemn the land for the purpose set forth."

## Power Taxes Paid

THE Alabama Power Company on April 28th paid to the treasurer of the state $169,429.35 for its corporate franchise taxes for the year 1939, which taxes were due May 1, 1939.

It was said by Thomas W. Martin, president of Alabama Power Company, that this payment went into the general fund of the state, while the majority of the other taxes paid in the state by the power company go into special school funds and aggregate more than $1,000,000 in a year.

Mr. Martin also pointed out this payment alone was equivalent to more than twice the total amount paid to the state by the Tennessee Valley Authority. He also said the total taxes of Alabama Power Company accrued for 1938 for Federal, state, and local purposes amounted to $3,227,659.64.

# Arkansas

## Gas Rate Hearings

THE future of the state public utilities commission depends on the success of its case against rates of the $50,000,000 Arkansas Louisiana Gas Company, hearings on which will begin "in about six weeks," Chairman Thomas Fitzhugh said on May 1st. He said the commission had staked everything on this case, and "we are prepared to rise or fall on its outcome."

Denying a published statement which he said intimated the case was indefinitely postponed, Mr. Fitzhugh asserted the 3-month hearing would get under way as soon as the commission has completed detailed exhibits to be offered in evidence.

The 18-month investigation into the company's rate structure has been completed, and the commission was ready for summarization and preparation of exhibits, Mr. Fitzhugh said. He stated:

"The outcome may mean a return of $900,000 to consumers of natural gas in Arkansas under a stipulation entered into with the company January 1, 1938. Rebates, if the rates are found to be excessive, would be retroactive to that date. The stipulation expires July 1st, but there should be no difficulty in extending it until completion of the hearing."

Two representatives of the Federal Power Commission were in Little Rock recently to familiarize themselves with the case preparatory to sitting with the state commission during the hearing. Their assistance will be welcomed when the hearing begins, Mr. Fitzhugh said.

## Ordered to File Reports

THE state utilities commission recently ordered the Arkansas Power and Light Company to file reports of its electric properties with the commission by June 30th and September 30th, and warned that failure to comply would subject the company to penalties.

The company was ordered to file the reports in a commission order November 19, 1937, in connection with a general investigation of company operations. The order said:

"The fact that the power company has repeatedly asked for extensions of time and has committed itself to dates for the filing of these data with which it has not complied, indicates that it has not prosecuted these studies with diligence."

Reports ordered filed were: (1) Completed inventory as of December 31, 1937, on or before June 30, 1939; (2) completed appraisal, applying prices as of December 31, 1937, on or before September 30, 1939; (3) completed audit of the records of the company for 1937 on or before September 30, 1939.

The Federal Power Commission, which is

making a similar investigation of the power company's properties, granted the utility until December 31st to complete a cost study of its electric plant in an order April 6th.

## Seek TVA Power

A CONFERENCE "to prove and demand requirements" for bringing Tennessee Valley Authority power across the Mississippi river for Arkansas consumers was scheduled to be held May 25th in Memphis, representatives from Eastern Arkansas Young Men's Clubs decided at a meeting in Forrest City last month, at which Roy Burch of Helena and Clyde B. Dennis of Marked Tree were co-chairmen.

Plans were launched for a meeting in Memphis, to which city and county officials, presidents of county farm bureaus, and business and professional leaders would be invited. Each of the 2,500 members of the 40 clubs in the EAYMC was asked to discuss the proposed TVA service with members of city councils to obtain a consensus of eastern Arkansas toward the project.

Mr. Burch said 100 people from Helena alone were expected to be present.

# Colorado

## Municipal Election Set

THE Fort Morgan city council recently drew up a resolution providing that a contract, under which the Reclamation Bureau proposes to sell electric energy to the city for a period of ten years, should be submitted to the voters of the city, and set June 12th as the date for the election.

Calling of the election climaxed almost a year of negotiations between the city council and officials of the Reclamation Bureau. Fort Morgan's municipal plant now furnishes power at the cheapest rates of any city in the state, but according to figures submitted by the government agency, the Reclamation Bureau can sell power generated at the Seminoe dam in Wyoming to the city cheaper than the city can produce it.

An exhaustive investigation of the entire project was conducted by Frank G. Prouty, Denver engineer, and submitted to the city council for transmission to the voters. Prouty made no recommendation one way or the other, but merely cited the advantages and disadvantages accruing to the city from the proposed transfer.

## Municipal Ownership Loses

OPPONENTS of municipal utility ownership in Montrose claimed a 1,230 to 909 victory last month after the sharply contested issue brought out the largest vote in the community's history.

Mayor A. B. Pinkstaff led the unsuccessful municipal ownership faction that sought a city charter amendment to permit construction of a $355,000 municipal power plant. The Western Colorado Power Company now serves this and near-by communities.

A Peoples Protective Association led opposition to the proposed charter change, and was supported by petitions from other towns served by the Western Colorado Company. The association was said to represent 70 per cent of the taxable property in Montrose.

Opposition petitions from neighboring communities, including Ouray and Telluride, and from rural power users in the California mesa district were brought into the campaign by municipal ownership foes. The petitions contended municipal ownership in Montrose would impair the service of Western Colorado Power in surrounding communities.

# Florida

## Ruling Hastens Refunds

REFUNDS to Miami electric consumers will not be delayed past the original limit set for their payment, as the result of U. S. District Judge W. H. Barrett's ruling on the method of computation, it was announced on May 3rd by Bryan C. Hanks, president of the Florida Power & Light Company.

Under the court decree the refunds must be paid not later than August 25th, and power officials have indicated the checks will go forward considerably sooner than that, although a definite date was not immediately available.

Judge Barrett's ruling, announced on May 2nd, was said to mean the addition of several hundred thousand dollars to the total amount of the refund checks, previously estimated at upward of $4,000,000. On the other hand, the court denied the city's application for payment of interest on the refunds due. Interest would have amounted to about as much as the increase due to an arithmetic computation, which the court ordered instead of an algebraic method, employed by the power company.

Judge Barrett's decision also was said to mean a saving of $44,602.64 to the city of Miami, under terms of a settlement recently approved on a number of controversial issues between the company and city. Had the court

ruled in favor of the algebraic computations, it would have meant the city would have to add the $44,602.64 to any over-all amount it must pay in settlement of differences.

# Georgia

## Rate Slash Confirmed

CHAIRMAN Walter R. McDonald, of the state public service commission, recently confirmed the announcement of slashes in Georgia Power Company rates. The slashes in the rates for domestic and commercial customers of the Georgia Power Company will be savings of upwards of $1,000,000 to approximately 206,000 of the company's 206,500 customers.

The new schedules bring the Georgia Power Company to within 5 per cent of rates fixed by the Tennessee Valley Authority, and in most instances lower than those of the Alabama Power Company, which operates in territory nearest to major TVA operations, it was said.

The rates would go into effect on bills rendered June 1st for current consumed in May.

## Power Rate Cut

A SPECIAL inducement rate estimated to save from $20,000 to $25,000 annually will apply to all commercial customers of the Savannah Electric Power Company on meter readings on and after June 1st, the state public service commission said recently.

The inducement rate schedule was set up for a 3-year time limit period, June 1, 1936, Chairman Walter McDonald explained. He said:

"During that time there have been savings to those customers who earned the inducement rate by increasing their consumption, and after June 1st the rate will apply to all the company's commercial customers with the additional estimated savings."

# Illinois

## Commission Appointments

GOVERNOR Henry Horner reappointed his cabinet of ten department heads on May 2nd and made two changes in the state commerce commission. He did not, however, name a chairman of the state commission to succeed U. S. Senator James M. Slattery, selected to fill the late Senator Lewis' seat.

The new appointees were William Hart to the commerce commission and Joseph E. Knight to be commission secretary in Hart's place. Knight had been an assistant commissioner.

# Louisiana

## State Commission Reports

THE state public service commission last month reported that it had reduced public utility rates in Louisiana $2,533,739 a year during the 4-year period since 1935 when the act assessing cost of investigations against utilities was passed by the Louisiana state legislature.

The report said cumulative savings to consumers during this period were calculated at $7,473,213 as of April 30, 1939, with total cost of investigations into rates "less than $300,000, or about 4 per cent of the savings to ratepayers." The public service commission's report stated:

"During the past two years this commission has issued orders reducing rates of 14 major electric and telephone companies in the state more than $1,000,000 per annum. The cost of investigations in these completed cases approximated $150,000. Since the gross revenues of the companies investigated were more than $22,000,000, the cost assessed against these utility companies was about three-fourths of one per cent of their aggregate gross revenues. The fixed capital of such companies, according to their books, was more than $95,000,000. It is believed that investigation costs in Louisiana are among the lowest in the country.

"During the four years since the passage of the act assessing costs of investigations against utilities, the commission issued orders reducing rates of all major electric and telephone companies in the state with some reduction also in gas rates in the area served by the 100-mile pipe line of Southern Gas Line, Inc., including provision for lowered gate rates to the city of Alexandria.

"The rate reductions for the four years from 1935-1938 inclusive amounted to $2,533,739 per year."

# Michigan

## Orders Held Valid

ORDERS issued by the defunct state public utilities commission, during a period when the new public service commission had been created by statute but was involved in a court test, are binding and valid, Attorney General Thomas Read ruled recently.

Read informed the new commission that its predecessor was a defacto agency during the period of the law suit. The attorney general's opinion stated:

"So far as third persons and the public are concerned, the orders and acts of the former members of the public utilities commission, entered and performed during the period of the time in question, are valid."

## Fight Sales Tax

OPPOSITION to House Bill 417, which would amend the State Sales Tax Act to include taxes on municipally sold water and electric power, was expressed recently in a resolution of the Detroit Board of Water Commissioners.

The measure was opposed because, according to Laurence G. Lenhardt, general manager of the department of water supply, the burden of the annual tax of $200,000 would fall on the small consumer. Similar opposition was previously expressed by the Public Lighting Commission. Louis J. Schrenk, superintendent of lighting, appeared before a committee of the house in protest.

# Missouri

## Temporary Order Denied

IN order to obtain a prompt decision rather than postpone the case until next fall, Justice O. R. Luhring of the United States District Court of the District of Columbia on April 29th denied to the Union Electric Company of Missouri a temporary order to prevent the Securities and Exchange Commission from investigating its affairs. Instead, he transferred the hearing directly to a 3-judge court. Chief Justice D. Lawrence Groner of the U. S. Court of Appeals of the District of Columbia, and Justices Luhring and Bailey of the district court were to hear the case.

Attorneys for the SEC agreed to this procedure on condition that the Union Electric stipulate to cease delays and interference which the SEC alleged had been practiced to prevent access to the company's records in St. Louis. The effect of Justice Luhring's ruling was to put off until after the 3-judge court meets the SEC hearing which was set for May 1st.

Because the company's petition challenged the validity of § 12(h) of the Holding Company Act, which the SEC for the first time invoked in this case as a basis for its inquiry into Union Electric's alleged use of funds to influence legislation and elections in Missouri, a constitutional point was raised. A Federal statute of 1937 provides that in such instances the case may be sent directly to a 3-judge court, including one member of the United States Circuit Court of Appeals.

## Gas Charges Held Unlawful

A FEDERAL investigation of the natural gas rates charged eight distributors serving 56 Missouri communities by the Cities Service Gas Company was asked recently by the state public service commission. The request, mailed to the Federal Power Commission, said the pipe line's present rates were "excessive, unreasonable, and unlawful within the meaning of the Natural Gas Act."

The investigation is necessary in order that legally established interstate gas rates may be available in "contemplated proceedings to establish reasonable and lawful intrastate rates to consumers in Missouri," it continued.

Cities Service Company is charging a gate rate of 40 cents per thousand cubic feet. The application stated natural gas is available at the source of supply at "less than 8 cents per thousand cubic feet."

# Nebraska

## Compromise Proposed

FACED with strenuous opposition from the State League of Municipalities, R. O. Canaday, representing the three state hydro-electric districts, has proposed a compromise that he said would enable the districts to go ahead with such purchases on a revenue bond basis.

The league opposed legislative plans which would have given Canaday a free hand to buy private utilities. His compromise plan would not take away from the cities any rights they now possess to condemn any utility, private or

public, within their borders, it was said.

Mr. Canaday proposed that the present law be amended so as to require that no purchase by them of private utility property within a municipality may be made before October 1, 1939, but that if municipalities do not institute or diligently carry on in their own behalf the purchase of such properties by that date, the districts will be free to proceed. The amendment was in the form of a prohibition of such purchases, or leases, without the consent of the municipalities, and that where the municipalities act there will be no interference from the districts.

# Pennsylvania

## PUC Fund Plea

THE state public utility commission on May 2nd appealed directly to the legislature for aid in its fight with the administration of Governor Arthur H. James over commission appropriations.

Taking the stand the explanation is due legislators, since the commission legally is an "arm of the legislature," Chairman D. J. Driscoll of the state utility commission outlined the probable results of further reductions in the commission's budget, as proposed by the governor. This move came as the commission received the latest of a series of demands from the James administration for successive cuts in monthly allocations from funds voted by the last legislature.

Chairman Driscoll told legislators a reduction of the budget to the level demanded would mean dismissal of 200 employees and an end to all field investigation of a number of utilities.

## Oppose Change in Law

RURAL members of the state legislature were to be urged by representatives of the Federal Rural Electrification Administration to oppose the so-called coöperative rural electrification program, on third reading in the senate early this month.

In a telegram to Governor James, REA Administrator John M. Carmody attacked two proposed amendments—the one to change the 1937 Public Utility Act and the other to amend the 1937 Rural Electrification Act. Senator Louis H. Farrell, Republican of Philadelphia, sponsored the bill to change the utility law.

The telegram to the chief executive from Carmody stated:

"One amendment would prohibit formation of electric coöperatives to serve areas where private utilities say they stand ready to serve without requiring utilities actually to serve. This is exactly like amendments that have been defeated in many states and that are customarily instigated by power companies. It would practically wreck extension of existing coöperatives and development of new ones, thus denying service to many thousands of Pennsylvania farm families."

The other proposed amendment, Carmody asserted, would reduce the "protective period" for coöperative formation and development "from eighteen to twelve months."

# South Carolina

## REA Bill Wins Support

THE state house last month passed a bill which would authorize and facilitate the organization of county rural electrification coöperative associations.

The measure had already passed the senate, where it had been introduced by Senator J. M. Lyles, of Fairfield. Representative Herbert E. Gyles, of Aiken, led the fight for its passage in the house.

Under this bill, coöperatives can be organized to obtain funds from Washington and proceed with the building of rural lines. The coöperatives would deal directly with the Federal REA at Washington.

# Tennessee

## Sign Contract for TVA Power

NASHVILLE on May 4th signed a contract for the purchase and resale of TVA power simultaneously with the announcement in Washington that a House subcommittee would open hearings on the Senate-approved Norris bill to make more elastic the bond-issuing power of the TVA.

Congressional approval of the Norris bill is necessary to consummation of the TVA-Commonwealth & Southern deal where Nashville

will purchase TEPCO properties in that district for $14,200,000. Chattanooga has agreed to assume its $11,000,000 share of the purchase, and the TVA will pay approximately $45,000,000 for transmission and power production properties of the Tennessee utility.

Commissioner Leon Jourolmon has urged the Nashville Power Board to refrain from placing surcharges on the TVA "yardstick" power rates when the city begins distribution of federally generated power. The state public utilities commissioner said that residential consumers would save $500,000 a year under present rates. Jourolmon declared:

"These estimated savings are based on the assumption that the Nashville Power Board will not place surcharges on top of the TVA basic retail rates for the purpose of operating the local distribution system as a profit-making enterprise."

City Attorney W. C. Cherry, replying to Jourolmon's statement, said that the question of surcharges on TVA power in Nashville would be left to the manager of the municipally owned plant and the Nashville Power Board under terms of the purchase contract.

# Washington

## PUD Bond Funds Asked

WASHINGTON public utility district commissioners recently dispatched to members of Congress a resolution asking that the government make funds available to purchase utility revenue bonds. The resolution was approved by commissioners of the Southwest Washington Utility District Association.

Public utility districts of Cowlitz, Lewis, Pacific, and Wahkiakum counties "have taken steps leading up to the construction and acquisition by purchase or condemnation" of transmission and distribution facilities, the resolution said, "and within the near future will issue utility revenue bonds for the purposes referred to."

"The public welfare requires that the United States government make funds available by means of an appropriate Federal agency or instrumentality, now or hereafter to be established, for the purchase of utility revenue bonds to be issued by the districts."

The request for Federal purchase of public utility district bonds was understood to be a direct result of the disagreement between the southwest Washington utility districts and their one-time fiscal agent, Guy C. Myers, New York broker, over delay in negotiations to purchase private utilities.

# Wisconsin

## PSC Reorganization Favored

A REORGANIZATION measure to abolish the 3-member state public service commission and to set up a single man directorship was reported favorably for passage on May 3rd by the state senate committee on corporations and taxation. At a hearing on that day the measure was opposed by representatives of railroad trainmen and briefly supported by two Republican senators.

Speaking in favor of the measure to reorganize the commission, Senator Kenneth S. White, Republican of River Falls, explained most of the work was done by the commission staff "and all you need is a good administrator to see that the staff does its work."

White maintained some employees of the commission were paid more than the commissioners and knew more about the work than the commissioners. A bill was reported pending in the senate to set up a board of review to hear appeals from the commission. This "disinterested board will be separate from the commission and will hear appeals," White continued.

Senator Morvin Duel, Republican of Fond du Lac, explained the bill merely would change the 3-man commission to a 1-man commission, and the amendment he introduced would provide for civil service for employees.

Fred S. Hunt, chairman of the present commission, outlined the scope of the commission's work and said the "Wisconsin commission is regarded as one of the best in the United States, if not the best. Whatever may be your opinion of the commissioners, we have a high-class staff."

At the first annual meeting of the Tri-State Power Coöperative held on May 3rd in Boscobel, seventy-five representatives present from the 11-member rural electrical coöperatives voted unanimously in opposition to any change in the set-up of the state commission.

Several representatives pointed out that while REA coöperatives in Wisconsin are not under the jurisdiction of the state commission, nevertheless these coöperatives in the past had had contact with the commission in matters involving conflicts with public utilities, and that the commission had been fair in its decisions involving conflicts between the coöperatives and public utility types of electric agencies.

# The Latest Utility Rulings

## Gas Pipe-line Company Held Subject To State Regulation

OVER the objections of the successor of United Gas Pipe Line Company, the Louisiana Public Service Commission ruled that the company was a public utility subject to commission jurisdiction. In this case, as in the case of the Interstate Natural Gas Company, 27 P.U.R. (N.S.) 145, the commission had ordered the company to show cause why its rates, charges, and practices within the state should not be investigated, revised, and modified. The company had refused to give the state commission's experts access to its property, books, records, and papers.

Construing the constitutional and statutory provisions, the commission concluded that such a natural gas pipe-line company had been placed under its jurisdiction. The commission also held that the company was a "common carrier" and a "public utility." The commission found no clear-cut distinction, much less any indication of mutually exclusive character, as between these two terms.

The company claimed that it was a strictly private corporation and that it transported and sold gas only under private contract and did not have the right of eminent domain. The possession or exercise of the right of eminent domain, said the commission, is not an essential characteristic of a public utility. The fundamental nature of the business was said to be the controlling test. The entire process of producing, transporting, and distributing natural gas was said to be of great public interest and importance. A natural gas pipe line, said the commission, is an economic monopoly in its essential character, and it has a vital relationship to the local utility service, is affected with a high degree of public interest, and by the very nature of the service to which it is put day by day it is devoted to a public use.

The device of separating the functions of production, transmission, and distribution among three affiliated corporations, the commission held, should not be allowed to defeat effective regulation of the price.

A part of the company's business is purely intrastate, another part consists of the sale of Louisiana gas in Louisiana after traversing a portion of another state, and a further part may be considered as purely interstate. The commission held that the company was not, by reason of its interstate operations, exempt from state regulation. *Louisiana Public Service Commission v. United Gas Pipe Line Co. (No. 3152, Order No. 2176).*

## Holding Company Not Exempted As Predominantly a Public Utility Company

THE Illinois Iowa Power Company was denied exemption from the provisions of the Public Utility Holding Company Act of 1935, under § 3(a)(2) of that act, upon a finding that it was not predominantly a public utility company. The Securities and Exchange Commission in making its decision referred to the fact that to qualify for exemption it must establish that it is predominantly a public utility company as distinguished from a holding company. It said:

The term "public utility company" is defined in § 2(a)(5) of the act as "an electric utility company or a gas utility company." The definition of these two terms as contained in § 2(a)(3) and (4) of the act makes it clear that they are to be taken to mean operating companies as distinguished from investment, management, or holding companies. Therefore the question is whether the applicant is predominantly engaged in utility operations or whether its holdings of stock of subsidiaries are sufficiently important to make an exemption under § 3(a)(2) unavailable to it.

An examination of the comparative net operating revenues of the applicant and its subsidiaries for the year 1937 discloses that the revenues of the subsidiaries (after eliminating intercompany transactions) aggregate about 39 per cent of the net operating revenues of the applicant. On the basis of fixed gross utility assets, the assets of the applicant's subsidiaries are approximately 38 per cent of the assets of the applicant. On the basis of net income, after eliminating dividends and interest paid to the parent by the subsidiaries, the subsidiaries have a considerably greater income than the applicant; Illinois Iowa's net income on this basis was, for the year 1937, $962,857, while the total net income of the subsidiaries for the same year was $1,513,958.

It is apparent that the business of the subsidiaries is an important part of the applicant's total business. In so far as net income is concerned, the applicant receives a larger amount from the subsidiaries than it does from its own operations.

*Re Illinois Iowa Power Co. (File No. 31-154, Release No. 1501).*

## Milk Transportation to Dairy Illegal Without Authorization

A COMPLAINT by a certificated motor carrier against a milk company transporting milk from farms to its plant was sustained by the Pennsylvania commission. It was found that a charge was made for transportation to the plant. Transportation was carried on by a member of the family operating the milk company, and farmers had been directed to use his services under threat of losing their market. Milk was purchased f.o.b. at the plant.

The commission, in overruling an objection that it lacked jurisdiction, said:

> Respondents also contend that their operations are not subject to commission jurisdiction, and, in support of that contention, cite Dairymen's Coöperative Sales Asso. *v.* Public Service Commission (1935) 318 Pa. 381, affirming the decision of the superior court in (1934) 115 Pa. Super. Ct. 100. We do not feel, however, that this case is controlling in the present situation. The Dairymen's Case dealt with carriers, transporting milk under contract with a coöperative association, from farmers who were members of the coöperative. In the instant case, no coöperative is involved. All parties deal with each other individually. The farmer produces the milk and sells it f.o.b. at the milk company's plant. The carrier transports the farmer's milk and is paid by the farmer through the medium of the milk company as a convenience. The milk company purchases the milk f.o.b. at its plant only if it meets the company's and the Milk Control Commission's standards. When the milk company takes over the business of transporting milk from farmers to its plant for compensation, it invades a field which is subject to the jurisdiction of this commission, and it cannot legally do so without commission authorization.

*Scholl v. Weisberger et al. (Complaint Docket No. 12584).*

## Utilities Not to Evade Responsibility For Selection of Optional Rates

THE New York commission ordered several public utility companies to cancel an amendment to their tariffs providing that the responsibility for the selection of an appropriate service classification rests on the utilities' customer.

Governor Lehman, in a message to the legislature, had taken the position that a law should be enacted to prevent utilities from avoiding the responsibility for

seeing that a consumer obtains the lowest available rate, but the commission held that even in the absence of such legislation it is within the province of the commission to prevent utilities from inserting in their rate schedules provisions which will reduce their liability under the guise of a contract said to be voluntary but which is practically compulsory, as a consumer cannot obtain service except according to company tariffs. Chairman Maltbie, speaking for the commission, said in part:

> In view of the complicated rate schedules that are in operation in many companies, consumers are entitled to receive the help of the utility. It may be impossible in some cases for anyone having the best intentions to predict in advance just what form of contract or service classification would produce the lowest available rate for the service rendered; and if the company acted in good faith, rendered every possible assistance to the customer, and did its best to properly advise him, it would, temporarily at least, be relieved of any responsibility in case the customer made a wrong selection. But to say that all responsibility for the selection of an appropriate service classification is on the customer and that the company is not responsible for a wrong classification regardless of what it says or does, is an extreme position and not justified by the statutes or present decisions of the courts.

*Re Brooklyn Edison Co. Inc. et al. (Case Nos. 9760-9764).*

## Court Denies Writ to Expel Company from City

A WRIT sought by the city of Springfield to oust the Springfield City Water Company on the ground the company's franchise expired in 1902 and it no longer had legal authority to use the city streets was denied by the Missouri Supreme Court *en banc,* and the ouster proceeding ordered dismissed.

The supreme court held the city, by numerous official acts and passage of ordinances acquiescing in various operations of the company between 1902 and 1936, when the ouster suit was filed, had "expressly construed" the original franchise ordinance, adopted in 1882, as "granting a franchise in perpetuity." This grant could be terminated, it was said, only by the city exercising its option, under provisions of the franchise, to purchase the water company property.

Under the circumstances, the court ruled, it "would be against right and justice" to grant a writ of ouster against the company, "and we therefore hold that the city is now estopped to deny that respondent (the company) has a perpetual franchise."

Attorney General McKittrick filed the ouster proceeding in December, 1936, at the request of the city, after a controversy between the city administration and the company over water service and rates. Municipal ownership of the water distribution system was advocated.

## Use of Phrase "and/or" Invalidates Municipal Plant Referendum

USE of the symbol "and/or," which has been described as a disingenuous modernistic hybrid, inept and irritating, was held by the Nebraska Supreme Court to have invalidated a referendum on the question of acquiring a municipal plant. This ungrammatical expression, which has crept into statutes, orders, and contracts in recent years, was condemned as leading to uncertainty, ambiguity, and multiplicity. It was said that its use confused the voters, who were unable to determine definitely the effect of their votes at the election.

Judge Paine, of the supreme court, in delivering the opinion, said:

> In the "and/or" annotation in 118 A. L. R. 1367, we find its use is condemned in statutes,

ordinances, and legislative acts. Its use in pleadings and instructions to jury is also criticized. Amidst almost universal condemnation, a very few decisions and articles in two law magazines appear to uphold its use. The great majority of courts do all in their power to discourage its use, and it has been criticized by one court in this language: "It is manifest that we are confronted with the task of first construing 'and/or,' that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents." Employers Mutual Liability Ins. Co. *v.* Tollefsen, 219 Wis. 434, 263 N. W. 376.

The ballot, said the court, was designed to secure the assent of those voters who favored the purchase of an electric light and power distribution system already in use for many years, an electrical plant costing in better times around $800,000 which some of the voters may have believed could be secured for an amount not exceeding the $250,000 mentioned on the ballot. On the other hand, the ballot was designed to secure the favorable votes of all voters who might favor the construction of an entirely new municipal electric light and power system to compete with the one established. It would also secure the affirmative votes of those who were not interested in either of these two things but in the entirely separate proposition, the construction of a transmission line to some government hydro project which would furnish the city firm power at approximate cost. These several propositions were submitted on the ballot without giving the voters a chance to vote for one as against the other. *Drummond v. City of Columbus.*

## Municipal Electric Plant Authorized

THE public service commission of Wisconsin affirmed its previously issued order authorizing a municipality to construct an electric generating plant on the ground that public convenience and necessity required such construction.

The commission said that as an electric utility the city owes the duty of adequate service to its customers at reasonable rates. It was said to be the commission's duty to see that the city meets that obligation.

The proceeding revealed that it would cost the city more to operate such a plant than it would to purchase energy from an existing electric plant. The commission, conceding this point, opined:

> True, there is a possible saving that will be lost if generated energy costs more than purchased energy. But if the city is willing to sustain that loss and prefers to generate the energy for its utility rather than to purchase that energy in spite of the possibility or prospect of that loss, we do not see how this commission has any authority to say that the city must purchase energy rather than generate it—so long as it satisfactorily appears that the rates charged to the consumers of the utility, and fixed by this commission, shall be no more than they would be if the city purchased its energy.

The opposition urged that the loss incurred would have to be borne by the taxpayers, and that the commission should protect them by preventing any such loss. In reply to this the commission said that its authority ends with the duty of protecting the consumer.

> If the city of Cumberland deems it wise or advisable to incur the expense of a possible loss in the operation of its utility, that is a matter on which this commission has no power to act since the commission is not a court and is without the powers of a court of equity to enforce the rights, against the city, of taxpayers in their capacity as such.

*Re City of Cumberland (CA-851).*

## Other Important Rulings

THE public utilities commission of Colorado held that a taxicab service from a point inside of a home rule city to an outside point, or from an outside point

to a point inside of the city limits, is of more than local or municipal concern, and it would not be in the interest of the public to divide such an operation at the city limits, but in the interest of good service it should be regarded as an intercity operation. *Re Publix Cab Co. (Application Nos. 4424-4427).*

The court of appeals of New York held that the fact that a customer tampered with electrical equipment so that the current used by him was not recorded by the meter does not preclude him from recovering from the electric company the penalty imposed by statute for discontinuing service without a 5-day written notice provided by law. *Fisher v. Long Island Lighting Co. 19 N.E. (2d) 682.*

The Ohio Supreme Court held that when a public utility files with the commission an application for modification of gas rates and also an appeal from a rate-fixing ordinance, the commission is required to dismiss the application and proceed under appeal. *Northwestern Ohio Natural Gas Co. v. Public Utilities Commission of Ohio et al. 19 N. E. (2d) 648.*

The supreme court of Florida held that an ordinance making it unlawful for drivers of taxicabs to solicit the patronage of passengers for any hotel or apartment house or to divert prospective guests of a hotel or apartment house to another was reasonable. *State ex rel. Hosack v. Yocum, 186 So. 448.*

The supreme court of Ohio held that where the public convenience and necessity demand a specialized type of motor transportation service of a kind and character different from that afforded by existing companies operating over the same route, a certificate may issue to a motor transportation company, limited to such specialized service, without first affording the other companies an opportunity to furnish such service, and especially so if the specialized or limited service has been organized and built up by the applicant through the means of other transportation facilities, the use of which has been closed to it by abandonment. *H. & K. Motor Transp. Inc. v. Public Utilities Commission of Ohio, 19 N. E. (2d) 956.*

The Pennsylvania commission held that a carrier, in order to qualify for a permit under the "Grandfather Clause" of the Public Utility Law, must have been in fact a bona fide contract carrier prior to June 1, 1937, and continuously have been rendering service since that date. The burden was said to rest upon the applicant to prove such qualification. *Re Spackman et al. (Application Docket Nos. 42630, 47500).*

The Washington Department of Public Service held that railroads should not be required to continue serving an area at a loss of revenue when it is conclusive that they cannot recuperate in the face of the fact that they would be compelled to expend a large sum of money to rehabilitate the equipment and at the same time meet the intense competition of other rail and bus operations in the territory. *Re Spokane, Coeur d'Alene & Palouse Railway Co. (Cause No. 7210).*

The superior court of Pennsylvania held that the commission did not have the power to prescribe rates for the primary purpose of enabling competing shippers to market their products or to neutralize the geographical disadvantages of producers. *Pennsylvania Railroad Co. v. Pennsylvania Public Utility Commission, 4 A. (2d) 815.*

The Pennsylvania Superior Court held that when a quasi judicial body is required as a condition precedent to an order to make a finding of facts, the validity of the order must rest upon the needed finding, which, if lacking, renders the order ineffective. *Pennsylvania Railroad Co. v. Pennsylvania Public Utility Commission, 4 A. (2d) 622.*

NOTE.—The cases above referred to, where decided by courts or regulatory commissions, will be published in full or abstracted in *Public Utilities Reports.*

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# Public Utilities Reports

COMPRISING THE DECISIONS, ORDERS, AND RECOMMENDATIONS OF COURTS AND COMMISSIONS

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17. The cost of conveyance of water to reservoirs, which makes possible the storage of water and its later use by both upper and lower licensed power developers, should be apportioned between the licensees in the ratio

fixed for storage works when, in the absence of such facilities, neither could have enjoyed any benefit by reason of storage of the flood waters in question, p. 16.

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*Water, § 20.1 — Federal licensees — Headwater improvements — Charges to lower licensees.*

19. An allocation of costs to water storage in determining the proportion of annual charges to be paid by a lower licensee benefiting from headwater improvements constructed by another licensee is faulty when it involves the variation of the higher licensee's plant operations and the exigencies of its load demand, with neither of which is the lower licensee concerned, p. 17.

*Water, § 20.1 — Federal licensees — Headwater improvements — Charges to lower licensee.*

20. The varying and irregular operations of a higher licensee's power plant should not be set up as the factor governing the allocation of stored water as to origin in so far as such allocation determines the charges to be paid by a lower licensee as its contribution toward annual costs of interest, maintenance, and depreciation, even though such procedure might simplify the accounting for stored water, p. 17.

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[January 23, 1939.]

APPLICATION *by federally licensed power company for determination under § 10 (f) of the Power Act of the equitable proportion of annual charges for interest, maintenance, and depreciation on its storage reservoirs and other improvements to be paid by a lower licensee; determination made.*

*Syllabus*

1. The general purpose of § 10 (f) of the Federal Power Act is to encourage orderly and comprehensive development of watersheds having power value through financial contribu-

tions by lower licensees who benefit from upstream improvements. Under it the Commission performs the statutory function of equitably apportioning annual charges for interest, maintenance, and depreciation on upper storage reservoirs and other headwater improvements.

2. Headwater improvements to be considered include, among others, those which are under Forest Service permit as well as those licensed under the Power Act.

3. The lower power developer can be expected to share the burden of headwater improvements only if benefit is available from storage releases. Benefits received by these licensees can be measured by the amount and value of energy generated at plants by use of stored water.

4. In determining benefits received by both upper and lower licensees, consideration should be given to constructed facilities but no consideration is to be given to probable new construction even though at one time its proposed construction was approved by the Commission for inclusion under license.

5. "Optional storage" is defined as that storage of water in reservoirs or other headwater improvements which could be used by upper licensee as natural stream flow through its plants and which, at a later time, would not increase the reservoir spill.

6. The storage of water which could have been used by the lower licensee at the time it was stored will be considered as "adverse" storage. The release of stored water by the upper licensee at a time when it must be wasted or spilled by the lower licensee will be considered as not beneficial to the latter.

7. In so far as conveyance charges are concerned, it is reasonable to consider that stored water originated in localities which would require the least cost of conveyance, irrespective of whether this accords with actual reservoir manipulation or plant operation by the upper licensee.

8. The cost of intake structures which are an integral part of a tunnel used for conveyance will be allocated to the tunnel cost rather than the reservoir cost even where such intake structures are located in the reservoir.

9. The conduits and tunnels shall be considered as being (a) in part devoted to the conveyance of water for direct use for current power plant operation, a function beneficial only to the upper licensee; and (b) in part devoted to the conveyance of water for storage and later use, a function beneficial to both licensees.

10. Apportionment of total annual charges for interest, maintenance, and depreciation on conveyance facilities shall be in the ratio that the amount of water conveyed for "direct use" bears to the amount of water conveyed for storage and later use.

11. Under the circumstances and conditions existing in this case, seasonal storage only shall be taken into account in determining the amount of water conveyed by the tunnels and conduits for storage and later use and the storage season for any reservoir for any year shall comprise the time between the dates of minimum and maximum elevation.

12. The value of power generated by upper and lower licensees from the storage releases depends upon two ele-

ments: (a) the number of kilowatt hours generated by each, and (b) the value of each kilowatt hour generated.

APPEARANCES: Roy V. Reppy and George E. Trowbridge, for Southern California Edison Company, Ltd.; Wm. B. Bosley and Robert H. Gerdes, for San Joaquin Light and Power Corporation; Oswald Ryan, General Counsel, William C. Koplovitz, Assistant General Counsel, and Willard W. Gatchell, Principal Attorney, for the Federal Power Commission.

By the COMMISSION: The Southern California Edison Company, Ltd., filed an application for determination under § 10 (f) of the Power Act of the equitable proportion of annual charges for interest, maintenance, and depreciation on its storage reservoirs and other headwater improvements to be paid by the San Joaquin Light and Power Corporation.

*Findings*

(1) The application is filed by the Edison Company as holder of license for project No. 67, which embraces Florence lake reservoir, Florence tunnel, the Mono-Bear diversion works and conduit, Huntington-Shaver tunnel, and Shaver lake reservoir; and as holder of Forest Service permit under the Department of Agriculture for Huntington lake reservoir.

(2) These storage reservoirs and other headwater improvements are used to convey and store water which is used by the Edison Company through its power houses Nos. 2A and 8 (which are parts of project No. 67) and power house No. 3 (licensed as project No. 120), and power houses Nos. 1 and 2 (which are under the Forest Service permit referred to above).

(3) The water is also used by the San Joaquin Corporation through its Kerckhoff plant, licensed as project No. 96, where the benefits are obtained for which payment is sought.

(4) The two companies referred to come within the provision of § 10 (f) of the Federal Power Act as holders of the licenses and permit referred to above.

(5) All of the facilities mentioned are located in California on the San Joaquin river or its tributaries. Water is stored in Florence lake located on the south fork of the San Joaquin river and conveyed through Florence tunnel to Huntington lake located on Big creek. Water is also carried to Huntington lake from Mono and Bear creeks through diversion structures and conduits which connect with Florence tunnel. Florence lake reservoir has a usable capacity of approximately 64,400 acre feet, and Huntington lake reservoir has a usable capacity of approximately 89,160 acre feet. From Huntington lake the water is conveyed to power house No. 1, and thence to power house No. 2, or it is conveyed through the Huntington-Shaver tunnel to Shaver lake reservoir, which has a capacity of approximately 135,283 acre feet and is located on Stevenson creek. From Shaver lake the water is conveyed through power house No. 2A. Power houses Nos. 2 and 2A discharge into the same pond on Big creek which serves as an intake for a tunnel and penstock leading to power house No. 8 located on the San Joaquin river, after which the water is conveyed through power house No. 3, the lowest plant of the Edison Com-

pany. Power house No. 3 discharges back to the San Joaquin river from which the water is again diverted by the San Joaquin Corporation through the Kerckhoff power house, project No. 96.

(6) Additional head of more than 1,500 feet is developed for power purposes by the water used through power houses Nos. 1 and 2 than by the water used through power house No. 2A. Huntington lake is fed by Big creek and its own rather limited drainage area in addition to the South Fork water diverted through the facilities mentioned.

(7) All of the power plants mentioned generate electric energy from the water stored in one or more of the three reservoirs of the Edison Company and conveyed through its diversion structures, tunnels, and conduits. Power houses Nos. 1 and 2 receive only water coming from Florence lake or Huntington lake and are served only by the Mono-Bear diversion works and conduit and the Florence tunnel, so far as this determination is concerned. Power house No. 2A receives water stored in Shaver lake and in addition at times receives water stored in Huntington lake and Florence lake and conveyed through Florence tunnel and Huntington-Shaver tunnel, or water diverted through the Mono-Bear diversion works and conduits into Florence tunnel. Power houses Nos. 8 and 3 and the Kerckhoff plant receive water from all of these resources and are served by all of the conveyance facilities.

(8) The number of kilowatt hours generated by the several plants from storage releases has been ascertained by actual measurements as reflected in Exhibit No. 3.

[1] (9) Neither the upper nor lower power companies herein have received benefits from unconstructed facilities and the cost of only constructed facilities which contribute to benefits should be considered by the Commission in this determination.[1]

[2] (10) The Florence tunnel intake is an integral part of the tunnel and its cost is a part of the cost of the tunnel.[2]

[3] (11) The Mono-Bear diversion works and conduit, Florence tunnel and Huntington-Shaver tunnel, in all of their several parts, are devoted to (a) the conveyance of water for direct use, and (b) the conveyance of water for storage and later use. The conveyance of water for direct use benefits only the Edison Company. The conveyance of water for storage and later use benefits both companies in the ratio set forth herein.[3]

(12) Under the circumstances and conditions existing in this case, the amount of water conveyed by the tunnels and conduits for storage and later use is determined from the seasonal storage in each reservoir. The storage season for any reservoir for any calendar year is the time between the dates of minimum and maximum elevation, taking into account the provisions of paragraph 15 below. The volume of water as measured between the minimum and maximum levels of a reservoir during any calendar year is the volume of water conveyed to that reservoir during that year for storage and later use, or which would have been

[1] See also post, p. 12.
[2] See also post, p. 14.
[3] See also post, p. 15.

conveyed under the provisions of paragraph 15 referred to, whenever said provisions apply.

[4] (13) Florence lake, Huntington lake, and Shaver lake reservoirs are used to store water which is beneficial to both companies. Benefits from these headwater improvements are directly measurable and should be determined from the quantity of energy generated at each plant below from water stored above.[4]

[5] (14) Benefits contributed through use of the tunnels and conduits are measurable in the ratio which the actual use of such facilities in conveying water for storage bears to the actual use of such facilities in conveying water for direct use in current power plant operation. Annual charges on tunnels and conduits should be determined directly for each year in accordance with this ratio.[5]

[6] (15) In considering the storage of water as affecting the charges for conveyance to storage, it is reasonable to make the computations as if the upstream reservoirs were utilized to the fullest possible extent before transferring water to lower reservoirs and thus incurring greater conveyance charges.[6]

[7] (16) In so far as conveyance charges are involved, substantial equity will be done both parties by considering that stored water originated in localities so as to require the least cost for conveyance, irrespective of whether this accords with the actual reservoir manipulation and plant operation by the Edison Company.

[8] (17) The value of the energy generated by each of the companies from the storage releases depends upon two elements, viz.: (a) The number of kilowatt hours generated by each; and (b) the value of each kilowatt hour generated.

(18) The licensees contended that the value of each kilowatt hour generated by the two companies from the stored water depends upon the time the stored water reaches the respective plants, condition of the reservoirs when the water is stored, control exercised over the time of releases, storage of water which is stored at a time when it would have been useful as natural stream flow to either company, hydraulic capacity and electric load of the San Joaquin Corporation at time of storage and receipt of the stored water, and wastage of storage releases.

[9–11] (19) An exact determination of the actual relative values of the energy generated in the respective plants using the stored water is not possible, but by giving due weight to the use which could have been made of the stored water at the time it was stored, the actual use of the stored water and the control over the storage and releases, a very close approximation of the actual values can be reached. The following elements enter into such a determination: optional storage, nonoptional storage, adverse storage, and wastage.

(20) "Optional storage" is the storage made by the Edison Company of water which at the time stored could have been used as natural stream flow through the Edison Company plants and which did not later increase the spill from its reservoirs.

(21) "Nonoptional storage" is all

[4] See also post, p. 11.
[5] See also post, p. 15.
[6] See also post, p. 18.

storage by the Edison Company other than optional storage.

(22) Water which is stored at a time when it would have been useful to the San Joaquin Corporation should be deducted as "adverse storage" from the total volume released from storage.

(23) Water coming from storage releases which is spilled or wasted over the Kerckhoff dam should be deducted from the total volume released from storage.

(24) The benefits derived from "optional storage" releases are dependent upon a number of contingencies which may arise later in the year and may be one or more of the following: (a) It may be possible to avoid using steam plants of lower efficiency at the time the water is released than when it was stored; (b) the energy generated by such stored water may be used to meet conditions of heavier load than had been anticipated; (c) use of such stored water may make it possible to use relatively cheap fuel at the time the water is stored instead of more expensive fuel later in the year; (d) the energy generated by such stored water may be used to develop primary power later in the year in the case of unanticipated demand; (e) the storage of water during "optional" periods sustains greater heads on power houses Nos. 1 and 2A during part of the year by keeping Huntington and Shaver reservoirs at higher levels; and (f) storage in such times may result in more water being stored during the year if unfavorable runoff conditions, which cannot be foreseen, occur later in the season.

(25) Each kilowatt hour generated at the Edison Company's power plants from its "nonoptional storage" releases has twice the value of each kilowatt hour generated at the Kerckhoff plant from all such storage releases.

(26) Each kilowatt hour generated at the Edison Company power plants from its "optional storage" releases has one-half the value of each kilowatt hour generated at Kerckhoff plant from all such storage releases.

(27) In accounting for stored water, so far as conveyance charges are concerned, substantial equity will result if the Edison Company observes the following program for allocating inflow to storage:

*Storage in Shaver Lake*

(All storage to be made from flows occurring during the storage season for this reservoir.)

a. Inflow from Stevenson creek.

b. Huntington-Shaver conduit accretion [7] (considered as conveyed by the lower section only).

c. Pitman creek diversion.

d. Unregulated or surplus flow from Big creek during the storage season of the Shaver reservoir if there is any such flow during this period above that required to fill Huntington lake to maximum capacity.

e. Florence tunnel accretion.[7]

f. Mono-Bear creek diversion.

g. Unregulated or surplus flow from the South Fork at Florence lake during the storage season of the Shaver reservoir if there is any such flow during this period above that required to fill Florence lake and Huntington lake to their maximum capacities.

[7] Where records of tunnel accretions are not available they shall be estimated on a monthly basis by taking monthly averages of the recorded accretions.

*Storage in Huntington Lake*

(All storage to be made from flows occurring during the storage season for this reservoir.)

a. Inflow from Big creek.

b. Florence tunnel accretion [7a] (considered as conveyed by Lower Florence tunnel only).

c. Mono-Bear creek diversion.

d. Unregulated or surplus flow from the South Fork at Florence lake during the storage season of Huntington reservoir if there is any such flow during this period above that required to fill Florence lake to maximum capacity.

(28) The cost of operation of the Edison Company's headwater improvements is not a part of the maintenance cost, but is a direct charge for which the Edison Company alone is responsible.

*Opinion*

An application was filed with the Commission on March 5, 1929, by the Edison Company as licensee of project No. 67 and as a permittee under the Forest Service, Department of Agriculture, seeking a determination of the amount due under § 10 (f) of the then Federal Water Power Act from the San Joaquin Corporation (a subsidiary of Pacific Gas and Electric Company) licensee of project No. 96, for such part as the Commission may deem equitable of the annual charges for interest, maintenance, and depreciation on certain storage reservoirs and other headwater improvements comprising part of project No. 67 and part of a project under Forest Service permit, and alleged to be beneficial to project No. 96. Upon investigation of the situation, it was found that project No. 120, also licensed to the Edison Company, should be considered in connection with the application and this has been done. Several hearings have been held for the presentation of all pertinent facts and arguments.

The pertinent paragraph of § 10 (f) of the Power Act (16 USCA § 803 (f)) as incorporated in the licenses issued for these projects reads as follows:

"That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission."

This paragraph was amended, August 26, 1935, so as to require the licensees or permittees affected to pay to the United States the cost of making such determination as fixed by the Commission.

*Fundamental Purpose of Statutory Provision*

**[12]** Congress in the enactment of § 10 (f) of the Power Act intended to encourage the orderly and comprehensive development of watersheds having power value through financial

[7a] Where records of tunnel accretions are not available they shall be estimated on a monthly basis by taking monthly averages of the recorded accretions.

contributions by lower licensees who benefit from upstream improvements where upper storage reservoirs or other headwater improvements will result in a more nearly uniform or desirable flow than is available under natural conditions. The section contemplates that where lower licensees and other power developers are benefited they shall participate in the financial burden incident to the orderly and systematic construction of power and storage facilities of a river basin. Such financial support of headwater improvements by downstream beneficiaries extends the feasible limits of such improvements in the common interest. The act imposes upon the Commission the task of equitably apportioning the annual charges for interest, maintenance, and depreciation of the upper headwater improvements so that each beneficiary may contribute its just share for the construction of such upper improvements of common benefit. It should be borne in mind that the public interest as well as the interest of the Edison Company requires a coördinated system with the various component features planned and laid out with respect to their utilization as a whole.

**[13]** The natural flow of the South Fork of the San Joaquin river and tributaries from which the water supply for the various plants is obtained is quite irregular being derived in large part from snow melting during the early summer months and it is obvious that the storage feature of the development is of great importance. The testimony shows, and there is no agument advanced to the contrary, that the Edison Company's so-called Big Creek System, comprising all of their plants considered in this case, would not have been economically feasible without a large amount of storage. Storage works, therefore, constitute an essential and inseparable part of the development of the unified system and cannot be considered as merely an adjunct or accessory to other project works.

The Florence, Huntington, and Shaver reservoirs furnish storage facilities of considerable value to both the Edison Company and the San Joaquin Corporation and their appurtenant structures, such as tunnels and conduits, make beneficial use of these storage reservoirs possible, thus enabling both companies to take advantage of the storage facilities. It has been necessary to separate the functions of the several conduits involved to determine what principles should govern in the allocation of the charges to be assessed against the lower developer, the San Joaquin Corporation.

**[14]** The lower licensee does not benefit from use of storage facilities when the water is released so as to reach the lower plant at a time when the water supply below is adequate to operate the lower plant and the storage water must be spilled. When the storage water benefits both licensees the proportion of the total benefit to be allocated to each party must be ascertained. Accordingly, the benefits received by each company can be measured by the respective amounts and values of usable electric energy generated by storage water at the several plants in which the storage water is used.[8] The Edison Company alone has control over the release of stored water and the San Joaquin Corpora-

[8] See ante, p. 8.

tion must take the stored water as it comes from the lowest Edison Company plant, power house No. 3.

*Unconstructed Facilities*

The Edison Company at one time proposed to construct storage reservoirs at Blaney Meadows, upstream from Florence lake, and at Vermillion valley, upstream from the diversion works on Mono creek. It also proposed to construct power house No. 4 with intake immediately downstream on the San Joaquin river from power house No. 3, which would increase the number of Edison units using the stored water.[9]

The San Joaquin Corporation contended that the unconstructed power house No. 4, which the Edison Company once proposed to build, should be included in computing benefits to the Edison Company because it was originally included in the development plans and was under Forest Service permit. This permit was revoked by the Secretary of Agriculture on February 18, 1933. An application for inclusion of power house No. 4 in project No. 120 was filed by the Edison Company with the Commission on July 19, 1929, but was withdrawn January 13, 1933. The San Joaquin Corporation argued that as the plant was originally a part of the Edison Company scheme of development, its abandonment reduced the potential benefits obtainable by the Edison Company from its headwater improvements.

The Edison Company argued that it would be inequitable to charge it as licensee for benefits which it might have received had power house No. 4 once proposed for construction been actually built and pointed out certain alleged inconsistencies or inequalities which might be brought about by an impartial application of the San Joaquin theory. For example, the Edison Company claimed that the theory which called for consideration of the proposed construction of power house No. 4 would require also consideration by the Commission of the proposed Blaney Meadows and Vermillion valley reservoirs with their potential benefits to both companies. Furthermore, such theory would require consideration of the potential advantage of power house No. 4 as a forebay regulator for the Kerckhoff plant which, in turn, might affect the ratio of relative values of the energy generated at the respective plants from the stored water.

It may be further stated that the San Joaquin Corporation is unable to allege or prove any obligation or duty upon the Edison Company to construct power house No. 4. There was no privity between the parties, either expressed or implied in the Edison Company's original intention to construct additional plants or other storage facilities and hence the Edison Company incurred no obligation to the San Joaquin Corporation in abandoning this intention. Nor were any expenditures shown to have been made by the San Joaquin Corporation in reliance upon the assumption that the Edison Company would construct power house No. 4.

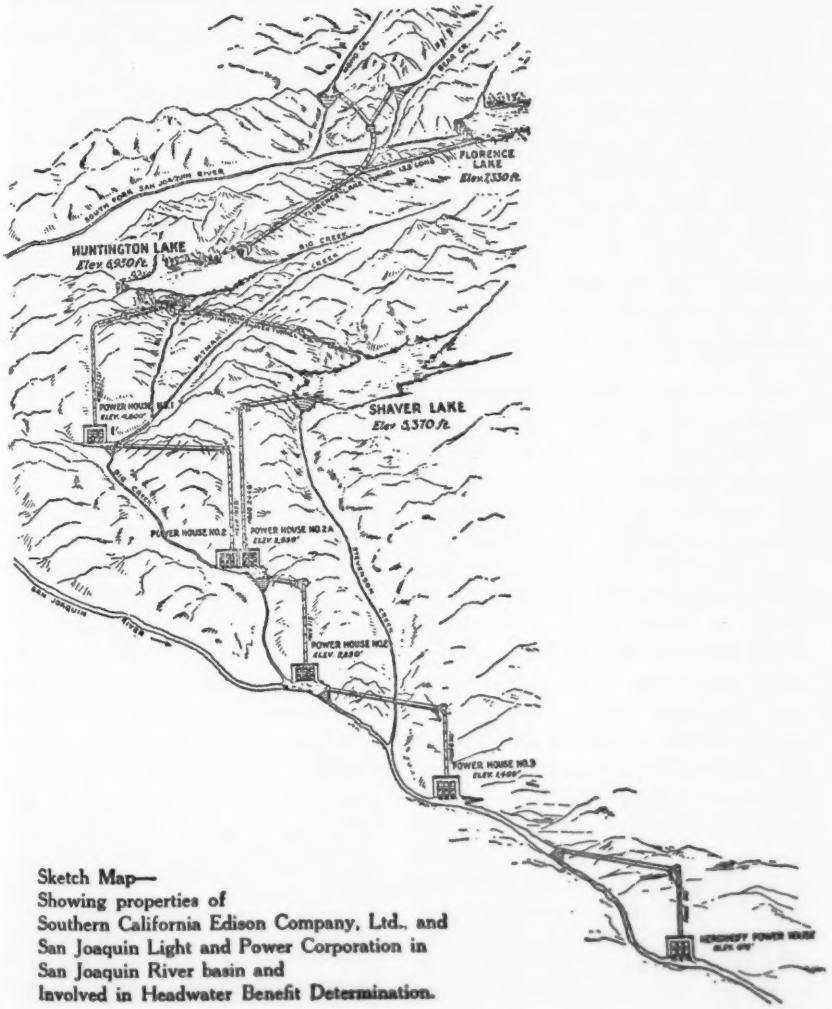
The Commission therefore is of the opinion that in determining the benefits received by both the upper and lower power companies, consideration should not be given to unconstructed facilities.

[9] See ante, p. 7.

*Structures to Be Considered*

The headwater improvements, all or a part of the annual charges for which are to be divided between the licensees, are as follows:

(1) Florence reservoir
(2) Huntington reservoir
(3) Shaver reservoir
(4) Upper Florence tunnel
(5) Lower Florence tunnel
(6) Mono-Bear diversion works and conduit
(7) Huntington-Shaver tunnel (upper section)
(8) Huntington-Shaver tunnel (lower section)
(9) Florence tunnel intake.




**Sketch Map—**
**Showing properties of Southern California Edison Company, Ltd., and San Joaquin Light and Power Corporation in San Joaquin River basin and Involved in Headwater Benefit Determination.**

**[15]** In addition to the cost incurred in constructing the above-listed facilities, the Edison Company incurred certain costs for water rights incident to the use of these facilities for storage purposes. Such costs of water rights have been included in the cost of the headwater improvements to which the rights are appurtenant. The annual charges by reason of such expenditures by the Edison Company are properly allowable to headwater improvements and are to be shared by the San Joaquin Company in the ratio set forth in the accompanying determination of the Commission.

With respect to the Florence, Huntington, and Shaver reservoirs, all of the annual charges for maintenance, interest, and depreciation are to be shared upon the basis of the ratios fixed in the aforesaid determination.

*Florence Tunnel Intake*

Question has been raised as to whether the cost of Florence tunnel intake should be charged to Florence lake reservoir or to the tunnel leading from Florence lake. The tunnel is the connecting link between Florence lake and Huntington lake and is the only means by which the water is carried from Florence lake and from Mono and Bear creeks. The tunnel intake receives water from Florence lake reservoir and admits it to the tunnel. The function of the reservoir is to store water and this function could be exercised without the use of the intake works. The function of the tunnel is to convey water and this function could not be exercised without intake works and no contention is made that the intake works provided are improper for the function which they are to serve. The Commission is of the opinion that the intake structure as an integral part of the tunnel should be considered with the tunnel and its cost (about $300,000) should be included in the cost of the tunnel.[10]

*Florence Tunnel, Mono-Bear Conduit, and Huntington-Shaver Tunnel*

It seems apparent that some part of the annual charges for the Florence tunnel, the Mono-Bear conduit, and the Huntington-Shaver tunnel should be allocated to headwater improvements, but the two companies disagree widely as to the proportions of such allocations and advocate divergent methods of arriving at the ratio to be used.

The San Joaquin Corporation admits that it was more economical to provide the storage reservoir capacity (conveyance to storage not included) as actually developed rather than by the alternate scheme including Vermillion valley and Blaney Meadows reservoirs, but advanced the alternate scheme as a measure of the maximum limit of tunnel and conduit costs properly allocable to conveyance to storage in Huntington or Shaver lake and to show the primary purpose of the tunnels and conduits. It contends that the cost of existing tunnels allocable to conveyance for storage could not reasonably exceed the additional cost of providing storage on the South Fork over the cost of storage capacity actually provided for South Fork flood waters. It did not, however, advocate the use of this additional cost figure for allocation to "conveyance for storage," but rather a still lower figure rep-

[10] See ante, p. 7.

resenting that company's estimated increment cost for enlarging tunnels to carry additional water for storage: That is, the additional cost of the tunnels as actually built over what the cost would have been had the tunnels been built only large enough to carry water for direct use.

In its opening brief, the San Joaquin Corporation admitted that the original plan of development included the enlarged Shaver lake reservoir, from which it would seem to follow that the original plan should have included tunnel and conduit capacity to fill this reservoir.

The San Joaquin Corporation also contends that because the cost of storage on South Fork was much less than that allocated to storage under the Edison Company theory, the purpose of the various conduits and tunnels must be primarily for conveying water for direct use through the Edison Company plants and, with respect to the facilities for conveyance to storage, only the additional cost of enlarging the tunnels so as to carry also water for storage is properly an investment in headwater improvements and a joint liability of the two companies.

*Interim Instructions of July 10, 1937*

After consideration of the record of hearings held and the several briefs filed by both licensees, the Commission on July 10, 1937, transmitted a letter to each company suggesting that certain decisions, criteria, and principles be followed by them in making computations of the amounts actually due to the Edison Company on account of the headwater improvements in question, which computations would serve as a guide to the Commission in making its determination.

*Allocation of Cost of Conveying Water for Storage*[11]

The San Joaquin Corporation requested a rehearing as to three paragraphs of the Commission's letter of July 10th dealing with allocation of the cost of conveyance structures upon the ground that the conveyance of water "for storage and later use" serves, at one and the same time, two functions, viz., (1) the development of storage, which is beneficial to both licensees in the ratio herein fixed by the Commission, and (2) development of the head utilized in the Edison Big Creek plants, which is beneficial only to the Edison Company. Consequently it argued, "the conveyance of water for storage and later use" is not "a function beneficial in its entirety to both licensees." The amount of money involved in the respective methods of allocating the cost of conveyance structures represents a substantial difference. The Commission granted a hearing upon this single question and additional arguments were made by both companies, followed by the filing of additional briefs.

**[16]** The correctness of part of the San Joaquin Corporation's claim must be admitted; that is, (1) that the water is stored at such points that it can be used through the Edison plants; and (2) that the tunnels and conduits convey water to storage. It does not necessarily follow, however, that the conveyance of water through conduits and tunnels in the Edison Company's system to points where it can be used

[11] See ante, pp. 7, 8.

through the Edison Company plants is beneficial only to the Edison Company.

As the San Joaquin Corporation points out, the water stored is naturally tributary to the Kerckhoff plant and since it would have flowed to that plant by the natural channel, the *place of storage* in the upper watershed has no effect on the amount of power produced by the Kerckhoff plant from stored water. The conveyance of water to Huntington lake reservoir is beneficial to the Edison Company in that the water is conveyed to a place suitable for developing head, when water is conveyed from Huntington lake to Shaver lake, but it is conveyed to a place where less head can be developed than if it were used directly for power development out of Huntington lake. When it is conveyed to either Huntington or Shaver reservoir, it is conveyed to a place where it may be stored, a conveyance function beneficial to both licensees.

**[17]** It is obvious, however, that neither Huntington lake nor Shaver lake could have been used as storage reservoirs for South Fork water and Mono and Bear creek water if conveyance facilities had not been provided to conduct the water to those reservoirs and neither company could have enjoyed any benefits by reason of storage of the flood waters in question. Hence, the cost of such conveyance, which makes possible the storage of water and its later use by both licensees, should be apportioned between the two licensees in the ratio herein fixed for storage works unless the position taken by the San Joaquin Corporation offers a more equitable treatment of such apportionment.

Even if the contention of the San Joaquin Corporation should be sound in assigning two functions to the Mono-Bear conduit and the Florence tunnel so far as stored water is concerned, it does not stand analysis when applied to the cost of the Huntington-Shaver tunnel when conveying water for storage in Shaver lake. It is not necessary to convey water beyond Huntington lake in order to reach a location suitable for developing head through the Edison plants. In this respect Huntington lake is similar to the San Joaquin river at the confluence of Big creek, for water at such confluence may be use for the development of power through power house No. 3 and the Kerckhoff plant without further conveyance cost. When water is conveyed from Huntington lake to Shaver lake through the Huntington-Shaver tunnel, the "head development value" is decreased rather than increased, because over 1,500 feet more of head is developed by water discharged from Huntington lake through power houses Nos. 1 and 2 than is developed by water discharged from Shaver lake through power house No. 2A.

At the hearing on December 16, 1937, counsel for the San Joaquin Corporation sought to prove the inequity of the method prescribed in the Commission's letter of July 10, 1937, by illustrating through Exhibit No. 15 two hypothetical assumptions which could be made under different plans for constructing reservoirs and tunnels, and argued that values could be assigned to various parts of the hypothetical projects so that under one situation the lower licensee would pay considerably more than the charges for

exactly the same benefits that could be secured by another type of construction. Under the figures given by counsel, payments by the lower licensee appear to be out of proportion to the benefits received. However, making arbitrary assumptions as to cost allocation to show that a lower benefited licensee might be required to pay more for the same amount of stored water under one situation than under another is not always a reliable method of proving the inequity of principles intended to be applied to existing structures to which the assumptions do not apply. By equally arbitrary selections of other cost figures, the reverse factual presentation could be made.

[18] Furthermore, these power plants and storage facilities have been constructed by the companies not with a view to taking undue advantage of the lower licensee but for the purpose of making an orderly, economic, and comprehensive development of this region. There has been no claim or proof of improper motives in making the upper improvements and the Commission must, therefore, consider the structures as built rather than some other plan which might have been adopted.

*Order of Inflow to Storage*

The conveyance facilities transport water for direct use and for storage. In considering the charges for conveyance for storage, some definite rules must be adopted to allocate the stored water as to origin.

The San Joaquin Corporation proposed a complete plan of allocation to storage based upon the contention that the more expensive water (i. e., water having the highest conveyance cost) should be utilized for direct use so that water stored should have lower transportation cost. This theory calls for the storing of all of the water tributary to Huntington and Shaver reservoirs, up to the capacities of the reservoirs, while, during the storage period, the power plants are being supplied with water for direct use by means of the Florence and Huntington-Shaver tunnels, or by drawing on reservoir storage already made from water previously conveyed by the tunnels.

[19] The figures submitted by the Edison Company modified the theory of allocation to storage and assumed that all of the water tributary to the above-mentioned reservoirs was stored during the storage season only on days when use of the water by the Edison Company plants did not exceed the flow through the Florence tunnel. To apply its modification of the San Joaquin theory, the Edison Company resorted to day-by-day accounting for stored water rather than seasonal accounting. This application is faulty because it involves the variation of the Edison plant operations and the exigencies of its load demand, with neither of which is the San Joaquin Corporation concerned.

[20] The Edison Company is in undisputed control of the operation of headwater facilities, storing and releasing water without regard to the wishes of the San Joaquin Corporation. When accounting for stored water is made on a seasonal basis and it is assumed that sources of origin may draw on reservoir accumulations to supply water for use during the storage season, the Edison Company has, as an alternative choice, the allocation of Big creek and Stevenson creek wa-

ters to storage in Huntington and Shaver lakes precedent to storage in these reservoirs from other sources. In making the determination herein sought the Commission considers that in storing water the Edison Company acts to some extent as agent or trustee for the San Joaquin Corporation, and is confronted with the choice of various sources of supply for obtaining the stored water. So far as the San Joaquin Corporation's interests are concerned, the water should be stored from the most inexpensive source and since that company is obligated to pay for a service rendered by the Edison Company, the latter company should perform that service as cheaply as consistent with the actual operation requirements of the unified system.

It is entirely reasonable and not inconsistent with actual and practicable operations that distant sources of supply should establish sufficient reserves or forebay credits in Huntington and Shaver lakes so as to be able to supply all plant demands during the storage season. The varying and irregular operations of the Edison Company's power plants should not be set up as the factor governing the allocation of stored water as to origin in so far as such allocation determines the charges to be paid by the San Joaquin Corporation, even though such procedure might simplify the accounting for stored water.

It has appeared reasonable to the Commission, in so far as conveyance charges are involved, to consider that stored water originated in localities so as to require the least cost of conveyance, irrespective of whether this accords with actual reservior manipulation or plant operation by the Edison Company. To carry this out, the Commission is prescribing a definite program for allocating inflow to storage to be observed by the Edison Company.[12]

*Principles Governing Allocation of Conveyance Costs*

In fixing the ratio of relative value of energy generated from storage releases, the Commission is attempting to arrive at the comparative net values of power produced from stored waters by each company. This is unquestionably the result so far as allowances are made because of storage adverse to San Joaquin Corporation. It follows that net values should be used also for the Edison Company. The net value of stored waters to the Edison Company as set up could not be subjected to a delivery charge as proposed by the San Joaquin Corporation and still be net value. This would appear to be charging the Edison Company twice for the same benefit and would thus be inequitable and contrary to the intent of the ratio fixed. It would be charging the Edison Company for the net value of a given benefit and then charging it again for expenses incident to the enjoyment of the same benefit.

Furthermore, the contention of the San Joaquin Corporation relative to the allocation of the cost of conveying water to storage is inconsistent with the assumption that these stored waters were on the same basis as to points of delivery. It is clear that in assigning a comparative value to any commodity, its location or point of delivery must be considered. It is also clear that stored water would be less valuable to the Edison Company or to the San

[12] See ante, p. 8.

Joaquin Corporation if burdened with an extra delivery charge.

The Commission has, therefore, concluded that comparative values set up must have, for a proper basis of comparison, similar assumptions as to points of delivery of the stored waters from which these values arise. It may be parenthetically noted here that water stored in Florence lake is considered as delivered at the Florence lake reservoir site on the South Fork in seeming violation of the foregoing precept. This may be reconciled by the justifiable concept that to the extent that tributary waters are preregulated by Florence lake, the additional cost of conveying such preregulated water over and above the cost of conveying unregulated water is zero. In view of its regulating functions and of the careful exceptions made in the ratio fixed to protect the San Joaquin Corporation, Florence lake may properly and equitably be considered as the plant forebay for such water as is stored therein.

The Commission, therefore, overrules the San Joaquin Corporation's contention with respect to the charges on the Mono-Bear conduit, the Florence tunnel, and the Huntington-Shaver tunnel, and reaffirms its conclusions as set forth in paragraphs 5, 6, and 7 of the Commission's letter of July 10, 1937, to the licensees.

*Interest on Annual Payments for Prior Period*

[21] The benefits herein referred to have been received by the San Joaquin Corporation from the headwater improvements of the Edison Company since 1923, and ordinarily payments would have been made annually beginning in 1924. Having in mind the delay in payment by the San Joaquin Corporation, the Edison Company claims interest upon past due payments. The annual charges of the Edison Company for interest, maintenance, and depreciation represent either outright disbursements or equivalent accounting entries at the time on the books of the Edison Company as kept in accordance with the system of accounts prescribed by the Federal Power Commission. The Edison Company has, therefore, been deprived of the use of the money representing such charges since the end of 1923.

Section 10 (f) of the Power Act requires as a condition of the license that the lower licensee directly benefited by construction work of a storage reservoir or other headwater improvement "shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable."

The Edison Company argues that its claim for interest should be allowed for the following reasons: (1) The right to interest is not based on contract, but on a law of Congress and it is entitled to interest on general principles of equity and justice; (2) it will not be fully reimbursed, as contemplated by the act, without the allowance of interest; (3) the obligation to pay for benefits is directly analogous to the obligation imposed on the United States by the Fifth Amendment to pay just compensation for private property taken for public use under the power of eminent domain; (4) if in the case where land is taken by the United States in advance of ascertainment or

payment of just compensation, the landowner is entitled to interest on the value of his land from the time of taking, so the upper licensee is entitled to interest on the amount found to be due for each year the benefit has been enjoyed by the licensee in advance of the ascertainment or payment of the reimbursements required under the act; (5) the Commission has jurisdiction to grant interest, this jurisdiction being equal to that of the I.C.C. in reparation awards; (6) interest may be allowed even though the statute makes no provision therefor.

There has been no unreasonable or improper delay in the payment of the debt of the San Joaquin Corporation and, until the proportion due to the Edison Company has been determined by the Commission as provided in § 10 (f) of the Power Act, the San Joaquin Corporation has no means of knowing how much it shall pay. The amount of the benefits in power developed from storage releases from the Edison Company facilities is not difficult of ascertainment by the lower company, but the apportionment of the headwater improvement charges to be borne by the San Joaquin Corporation calls for refinements not necessary in measuring the benefits. The San Joaquin Corporation frankly admitted that it has received benefits greater than the amount claimed by the Edison Company for reimbursement, but the companies have been unable to agree on some of the fundamental principles to be followed in determination of the proportion which should be paid.

No annual payments have been made by the lower licensee because such payments could not be made until a determination had been reached by the Commission of the proportion of the annual charges which the Commission deems equitable. The first determination of the proportion of such charges to be paid by the lower licensee is now made by the Commission, and for the first time liability for specific payment will attach.

In determining the part of the annual charges which the lower licensee shall pay in order to reimburse the upper developer, the Commission does not allow the Edison Company's claim for interest. Section 10 (f) of the act does not specifically authorize the payment of any interest and the amount of the obligation is unliquidated and incapable of ascertainment prior to the time the Commission fixes the proportion.

### *Capital Cost of Headwater Improvements*

The responsibility of the Commission under § 10 (f) of the act is limited to a determination of the equitable proportion of the annual charges for interest, maintenance, and depreciation on upper storage reservoirs and other headwater improvements. The capital cost of improvements constructed by the Edison Company under license will ultimately be determined by the Commission and tentative costs have been claimed by the Edison Company to which the proportions herein determined by the Commission shall be applied. When the Commission makes its determination of costs of projects Nos. 67 and 120, any discrepancy between such determination and the tentative claim of the Edison Company can readily be adjusted between the two companies.

Huntington lake reservoir, one of

the storage reservoirs involved, is operated by the Edison Company under Forest Service permit and the Commission will not make any determination of its cost. The Railroad Commission of the state of California, in Decision No. 8815 entered on March 31, 1921 (P.U.R.1921D, 65) when the rates of the Edison Company were under consideration, fixed the rate base for this company including an allowance for all of the Big creek properties which were constructed as of that date. If the cost of Huntington lake reservoir can be segregated from the other costs of the Big creek properties, such segregated cost, or any other determination by the California Railroad Commission of the appropriate cost, may be used. In case no official determination of the cost of this reservoir is available, an agreement must be reached by the two licensees for the purpose of the payments involved.

After the cost of storage reservoirs and other headwater improvements has been ascertained the annual charges for interest, maintenance, and depreciation thereon may be agreed upon. The determination by the Commission, in this proceeding, of the proportion of annual charges to be paid by the lower licensee is not to be taken as approval of the capital cost of any structures or approval of interest, maintenance, or depreciation charges thereon for any purpose.

Upon the basis of the foregoing findings and for the reasons set forth in its opinion, the Commission has reached the conclusion that the proportion of annual charges for interest, maintenance, and depreciation on the storage reservoirs and other headwater improvements of the Edison Company directly benefiting the San Joaquin Corporation during the years 1923 through 1936, is the proportion set forth in the Commission's determination of this date which is hereby made a part hereof, and such proportion is equitable for the years specified therein.

SCOTT, Commissioner: Being unable to accept certain of the findings adopted by the Commission, I concur only in the result of the determination.

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*NEW YORK DEPARTMENT OF PUBLIC SERVICE, STATE DIVISION, PUBLIC SERVICE COMMISSION*

# Re Producers Gas Company

[Case No. 9142.]

*Intercorporate relations, § 8 — Gas supply contract — Commission approval.*

1. A contract between a gas distributing company and a gas producing company merely providing for the sale of gas and for its incidental transportation through the lines of the distributing company does not require the approval of the Commission, p. 24.

*Leases, § 3 — Objections — Foreign corporation.*

2. The leasing of gas lines of a gas utility company which is a domestic corporation to a foreign business corporation is contrary to Commission policy as not in the public interest, p. 24.

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*Corporations, § 20 — Foreign business corporation — Intrastate gas transportation.*

Statement that it is doubtful if a foreign business corporation has any legal right to engage in the intrastate transportation of gas in the state, p. 24.

[February 9, 1939.]

PETITION *for approval of contracts between gas companies for lease of lines and sale of gas; denied.*

APPEARANCES: Fred C. Fernald, Boston, Mass., appearing specially for Godfrey L. Cabot, Inc., and Cabot Gas Corporation; Quigley & Vedder, by Earl C. Vedder, Olean, for Producers Gas Company; Charles G. Blakeslee, New York city, Attorney for Godfrey L. Cabot, Inc.; Hugh Burdette, Olean, General Superintendent, Godfrey L. Cabot, Inc.; Gay H. Brown, Counsel to the Public Service Commission.

BURRITT, Commissioner: The original petition in this case asks for the approval of certain contracts entered into between the Producers Gas Company and the Belmont Quadrangle Drilling Corporation, and for the assignment by the latter corporation of these contracts to Godfrey L. Cabot, Inc. On November 26th a new and superseding contract directly between Producers Gas Company and Godfrey L. Cabot, Inc., was filed. Although the petition is for the approval of contracts, what is really before the Commission is the company's request for approval of certain so-called leases or agreements of gas lines by Producers Gas Company to Cabot, the terms of which are contained in the same contract. It is not necessary for the Commission to pass upon the contract at this time.

The Producers Gas Company (hereinafter referred to as "Producers") is a domestic and public utility corporation supplying gas to a portion of the city of Olean and to the towns of Portville, Genesee, and Sanford. This company is not affiliated with Cabot.

The Belmont Quadrangle Drilling Corporation (hereinafter referred to as "Belmont") is a Pennsylvania business corporation engaged in drilling for gas and the transportation of gas. It is not affected by the petition as now amended.

Godfrey L. Cabot, Inc. (hereinafter referred to as "Cabot") is a Massachusetts business corporation engaged in drilling for and in the transportation, wholesaling, and distribution of, natural gas in northern Pennsylvania and southern New York. It should be noted that Cabot has a wholly owned subsidiary—Cabot Gas Corporation, which is a domestic corporation and a public utility, but which is not involved in this proceeding.

The original hearing in this proceeding was held April 16, 1937. At that time there was also pending the application by Cabot Gas Corporation

for consent to acquire all or not less than 85 per cent of the common stock of Producers (C. 8946). Since the approval of that petition would have made the Producers an affiliate of Cabot, and in that event require further consideration of the cost of service (§ 110), and for other reasons, it was thought best to defer the report in this proceeding until the final disposition of Case 8946. This was made on June 9, 1938, when Cabot Gas Corporation's petition was denied. (See report of Examiner Wilkinson, dated June 2, 1938.)

Another reason for deferring determination in this case was the pendency of certain legal objections hereinafter referred to, to the granting of the original petition. Certain of these objections have now been removed by the filing of a new contract directly between Godfrey L. Cabot, Inc., and the Producers Gas Company, which supersedes the original contracts and which is not subject to the legal objections just referred to. Other objections have not been met.

The status of the leases or agreements in the new contract remain the same as when made except as to dates of expiration, and except that only two instead of three lines are now involved. The existence of these agreements, if approved, assures Producers of a gas supply and Cabot of a market, to the extent provided.

*The Contracts*

Contract No. 15 superseded Contract No. 14 and was made June 15, 1936. Under this contract Belmont agreed to sell gas to Producers at certain prices and also to lease a certain three Producers' gas lines referred to in paragraphs 4 and 5, for a period of three years ending December 31, 1939. Neither this contract nor the agreements therein contained were ever filed with the Commission and no approval thereof was ever asked or given by the makers. This contract and the leases or agreements, therefore, are not legal. This application, nunc pro tunc, cannot therefore be approved.

Contract No. 15, dated late in 1936, purported to be an assignment by Belmont to Godfrey L. Cabot, Inc. Since the original contract was not legal it could not be legally transferred and therefore the assignment has no legal force and cannot be approved now.

Contract No. 16 between Belmont and Cabot, made December 11, 1936, purports to amend Contract No. 15. It is for a period of five years ending December 31, 1941, thus attempting to extend the term of the contract, including leases, for a period of two years beyond that provided in Contract No. 15. For the reasons already stated this contract also is not a legal one.

After these objections had been pointed out by counsel to the Commission, a new and succeeding contract, No. 32, was executed on November 17, 1938, by Producers Gas Company for the purchase of natural gas from, and for the purported lease of two lines directly to Godfrey L. Cabot, Inc. This is interpreted as in effect a withdrawal of the original petition for approval of the original contracts and the substitution of a new contract. The provisions of this contract are set forth in detail in a memorandum of the tariff bureau to me under date of December 5, 1938, copy of which is attached hereto.

The provisions, including rentals, for the so-called lease of the two lines in Contract No. 32, under which Producers will transport gas for Cabot remain the same as in the original contracts Nos. 15 and 16, which were between Producers and Belmont. The question before the Commission is whether it pass upon these leases or agreements. Contract No. 32 in and of itself does not require approval at this time.

*The Lines Involved*

The lines involved in the agreements in the contracts as revised are two:

(b) an 8" line from Sanford station to Olean, 61,948 feet in length;
(a) 6" and 5⅝" lines (referred to hereinafter as 6" line), (18,236 ft.) Sanford station to Bolivar.

The 8-inch main from Sanford station to Olean was purchased by the Producers about 1925 from Empire Gas and Fuel Company. It was constructed by Iroquois Gas Corporation or its predecessors, about 1902. The line was first used by the Producers to transmit cracking still gas purchased from the Vacuum Oil Company from Olean to Sanford, in the opposite direction from its present use, and to furnish its local customers along the line and in Sanford. Later, when a supply of deep well gas was discovered and developed the company secured an industrial load in Olean and used the line to transmit such gas to Olean; then, when the contract was made with Belmont to purchase gas delivered in Olean, the Producers had no further need of this line, which was leased to Belmont. This lease or agreement which the latter first attempted to assign to Cabot, is now made directly with Cabot.

The portion of the line from Sanford station to Bolivar is said to be used by Cabot exclusively to furnish gas to Allegany Refineries, Inc., which used 118,382 thousand cubic feet in 1936. Producers used the line to transmit 160,504 thousand cubic feet in 1936. From this data it appears that the excess capacity of this portion of the line leased to Cabot was about 42 per cent in 1936. This gas originates in Pennsylvania. Counsel for Cabot takes the position that this is a contract in interstate commerce and not subject to our jurisdiction distinguishing it from the Penn York Case.

*Conclusions*

If these are proper and lawfully made leases it is our duty, under § 70 of the Public Service Law, to determine whether or not they are in the public interest. This would involve an examination of the facts as to the usage of the lines and adequacy of the rental as well as other matters affecting the public interest. However, if it appears that the so-called leases are not legally made, then such an examination is not necessary.

[1] The contract, under consideration in this proceeding, is somewhat unusual in form in that it provides both for the sale of gas and for the transmission of gas through pipe lines of the Producers Company. If it is intended that the contract merely provide for the sale of gas and for its incidental transportation through the lines of the Producers Company, it does not require our approval. This appears to be the situation.

[2] Even if it is not, the record shows that Godfrey L. Cabot, Inc., is

a foreign business corporation. The leasing of property of the Producers Company, a domestic corporation, to such a foreign corporation is contrary to Commission policy as not in the public interest. Further, it is doubtful if such a business corporation has any legal right to engage in the intrastate transportation of gas in New York state.

Whichever of these conditions is actually the fact, the petition should be denied. An order is submitted accordingly.

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*MARYLAND COURT OF APPEALS*

# Home Owners' Loan Corporation of Washington, D. C.

*v.*

# Mayor and City Council of Baltimore et al.

[No. 86.]

(— Md. —, 3 A. (2d) 747.)

*Service, § 126 — Duty to serve — Municipal plants.*

1. A municipal plant is under a duty to furnish to all persons applying therefor the service which it offers without discrimination and at reasonable rates, where the service requested is within the reasonable range of its plant, equipment, lines, or mains, p. 27.

*Municipal plants, § 2 — Status — Extraterritorial service.*

2. A municipality acts in its business or proprietary capacity in operating a utility plant, especially where the service is supplied beyond the territorial limits of the city, p. 27.

*Rates, § 1 — Distinguished from taxes.*

3. Rates for service furnished by a municipal plant, sometimes referred to as taxes, are literally service charges and are not taxes in the ordinary sense of the word, p. 28.

*Payment, § 67 — Methods of enforcement — Lien on property.*

4. Water rents are not a lien on the property served unless made so by statute, p. 28.

*Payment, § 36 — Discontinuance to enforce — Arrearages of former owner.*

5. A public utility may not, in the absence of statutory or contractual authority, discontinue its service to property to coerce the owner thereof into paying charges incurred by a former owner for service rendered before the present owner acquired title, unless the charges constitute a lien on the land, p. 28.

*Payment, § 67 — Statutory liens — Service beyond city limits — Municipal plants.*

6. A statute authorizing enforcement of municipal water rents by "same process that city or state taxes are collected, or they may be collected by process before a justice of the peace, or in any courts of the city having jurisdiction of such cases" was not intended to apply to the collection of charges for delivering water to property beyond the city's territorial limits, and when no other statute makes charges for water service supplied by the municipality to property beyond its territorial limits a lien thereon, no lien on such property for such charges exists, p. 28.

*Payment, § 9 — Liability for service to former owner.*

7. A water utility's rule that, in the absence of an application by a new owner, the utility may treat his acceptance of the service as acceptance of the contract obligations of the former owner "accruing from and after date of change of ownership," is intended to make the owner of property liable for service to him while he owns it, not to make him liable for a former owner's debt, p. 30.

*Payment, § 36 — Service denial to enforce — Arrearages of former owner.*

8. A rule of a water utility authorizing a discontinuance of service if rates are in arrears for fifteen days does not authorize discontinuance of service to a new owner of the property served for arrearages of a former owner, p. 30.

*Payment, § 36 — Liability of purchaser at mortgage foreclosure sale — Water rents.*

9. A purchaser of property at a mortgage foreclosure sale is not liable for water rent charged against mortgagors, in default, under covenant that until default "the mortgagors shall possess the premises upon paying in the meantime all ground rent taxes and assessments, levies, public debts, and charges of every kind," since water rent was not included therein and since there was no privity of estate between mortgagors and purchaser, p. 31.

[January 11, 1939.]

APPEAL *from order dismissing petition in mandamus proceeding to compel restoration of water service to petitioner's property; reversed and case remanded for further proceedings.*

Argued before Bond, C. J., and Offutt, Parke, Sloan, Shehan, and Johnson, JJ.

APPEARANCES: Thomas E. Barrett, Jr., and Franklin P. Gould, both of Baltimore (John I. Rowe and Risque W. Plummer, both of Baltimore, on the brief), for appellant; Charles R. Posey, Jr., Assistant City Solicitor, of Baltimore (Charles C. G. Evans, City Solicitor, of Baltimore, on the brief), for appellees.

OFFUTT, J.: This appeal is from an order of the Baltimore city court dismissing the petition of the Home Owners' Loan Corporation for a writ of mandamus directing the defendants, the mayor and city council of Baltimore and Leon Small, water engineer of Baltimore, to restore the water service to the petitioner's property located near Catonsville in Baltimore county.

It is alleged in the petition that the Home Owners' Loan Corporation is

a corporate instrumentality of the Federal government, organized, existing, and operating under a Federal Act approved June 13, 1933, 12 USCA §§ 1461 to 1463a, inclusive; that in the exercise of its lawful powers it acquired by deed from Augustus A. Piper, assignee, on July 29, 1926, title to a tract of land containing about 22.34 acres on the Frederick road and Devere lane in the first election district of Baltimore county; that the defendants are under a duty, upon application, to supply that property with water, but that they on February 16, 1936, discontinued water service to the property; that after petitioner took title to the property, defendants submitted to it a claim for water service charges of $139.12 covering charges for water supplied to the property during a period beginning November 2, 1934, and ending March 31, 1938; that petitioner denied its liability for charges accruing prior to the date on which it acquired title to the property, but tendered itself ready and willing to pay all charges accruing since that date and demanded that defendants restore water service to the property, but that defendants refused to restore said service unless appellant paid all arrearages including those which had accrued before it took title to the property and that such refusal will result in great and irreparable damage to the petitioner.

Defendants after denying all issuable allegations of fact, alleged that the service was discontinued on April 12, 1937, and asserted its right to refuse water service to the property until all arrearages for water service thereto are paid.

The case was tried on those pleadings and at the conclusion of the trial the petition was dismissed. The question submitted by the appeal is not novel. It is whether a public utility corporation under a duty to supply without discrimination, its service to all persons applying therefor, may rightfully refuse to serve a person who acquired title to property from an owner served by the utility, unless and until the transferee pays all charges and arrearages due by the former owner to the corporation for service rendered before the transfer.

**[1, 2]** It is axiomatic that a public service corporation, private or municipal, is under a duty to furnish to all persons applying therefor the service which it offers without discrimination and at reasonable rates, where the service requested is within the reasonable range of its plant, equipment, lines, or mains. Dillon on Mun. Corp. 5th Ed. § 1317; McQuillin on Mun. Corp. § 1946 n. §§ 1821, 1829; 51 C. J. 7; Merryman v. Baltimore City (1927) 153 Md. 419, 427, P.U.R.1928B, 546, 138 Atl. 324. Where the service or utility is supplied by a municipality, it has been said that while the purpose must be public and the utility must be impressed with a public interest, nevertheless the municipality acts in its business or proprietary rather than its governmental character, McQuillin on Mun. Corp. § 1946; 43 C. J. 420; Wagner v. Rock Island (1893) 146 Ill. 139, 34 N. E. 545, 21 L.R.A. 519, and that is especially true where the service is supplied beyond the territorial limits of the municipality, Dillon on Mun. Corp. §§ 1299, 1300.

The decided weight of authority supports the proposition that a municipality engaged in a public utility busi-

ness may not supply the utility beyond its territorial limits unless thereto authorized by a statute, by its charter, or by the Constitution of the state in which it is located. Dillon on Mun. Corp. § 1299; McQuillin on Mun. Corp. §§ 1944, 1945.

In this case the power of the city of Baltimore to furnish water to the inhabitants of Baltimore county may be found in its charter, Charter and Pub. Loc. Laws, of Baltimore City, § 6, subsections 30(b) 30(G), (E); Baltimore City v. Day (1899) 89 Md. 551, 555, 43 Atl. 798; Merryman v. Baltimore City, *supra,* and in certain statutes, Chap. 82, Acts 1918, § 17; Acts 1908, Chap. 214, § 1 (p. 649), § 17. Collateral to, but considered in connection with these statutes are certain ordinances of the city of Baltimore. Baltimore City Code, Art. 48, §§ 14, 27, 35, and Chap. 186, Acts 1937; Chap. 539, Acts 1924.

**[3–5]** The rates for the service sometimes referred to as taxes are literally service charges. They are not taxes, in the ordinary sense of that word, Pond on Public Utilities, §§ 222, 224; Dillon on Mun. Corp. § 1323; McQuillin on Mun. Corp. § 1948, but are commonly referred to as rates or rents, although the charge is for a commodity actually consumed, but as the term "service charge" is not infrequently applied to the installation of equipment, the term "rent" conveniently and sufficiently identifies and distinguishes the charge for supplying the water. The general rule is, that unless made so by statute water rents are not a lien on the property served, McQuillin on Mun. Corp. § 1949, Dillon on Mun. Corp. § 1323, nor, in the absence of statutory or contractual authority may the corporation discontinue its service to property to coerce the owner thereof into paying charges incurred by a former owner for service rendered before the present owner acquired title thereto, 27 R. C. L. 1455; McQuillin on Mun. Corp. §§ 1822–1825; Title Guarantee & Trust Co. v. 457 Schenectady Avenue (1932) 260 N. Y. 119, P.U.R.1933D, 169, 183 N. E. 198, 86 A.L.R. 347; 28 A.L.R. 486; Etheredge v. Norfolk (1927) 148 Va. 795, P.U.R.1928A, 409, 139 S. E. 508, 55 A.L.R. 781; 13 A.L.R. 349, unless the charges constitute a lien on the land. Ibid.

In this case no provision can be found in any statute affecting the rights of the parties which expressly makes water rents a lien on the property served or authorizes the corporation to discontinue its service to property unless the owner thereof pays the debt incurred by a former owner for service to him.

**[6]** It is suggested that since Charter and Pub. Loc. Laws of Baltimore City, § 6, subsec. E., provides that payment of water service charges may be enforced "by the same process that city or state taxes are collected, or that may be collected by process before a justice of the peace, or in any of the courts of the city of Baltimore having jurisdiction in such cases," that such charges are by the force of that statute a lien on the property served. The only authority cited in support of that proposition is a decision in one of the law courts of Baltimore city, 3 Baltimore City Reports 152, without attempting to review that case, which is not in point here, it may be said that while logic and certain analogies lend some support to the conclusion of the court

in that case, the general trend of case law appears to be the other way. Taxes are not a lien on property unless expressly made so by statute, 61 C. J. 912, 920; Thompson v. Henderson (1928) 155 Md. 665, 666, 142 Atl. 525, 58 A.L.R. 1213; Parlett v. Dugan (1897) 85 Md. 407, 409, 37 Atl. 36; Dillon on Mun. Corp. § 1421, for as stated in Cooley on Taxation, Vol. 3, § 1230: "The general rule is that taxes are not a lien unless expressly made so by statute or ordinance; and a statute to create a tax lien must expressly provide for the lien, or the implication must be so plain as to be equivalent to positive language." In this state legislative recognition of that principle may be inferred from the fact that the legislature has in express terms made all "state, county, and city taxes" a lien on real estate in "respect of which they are levied," Code 1935, Supp. Art. 81, § 69; Code, Art. 81, § 56. If that is true of taxes a fortiori it must be true of such a charge as a water rent. The statute does, it is true, authorize the enforcement of the payment of such charges by the "same process that city or state taxes are collected, or they may be collected by process before a justice of the peace, or in any of the courts of the city of Baltimore having jurisdiction of such cases," but that very language indicates in the clearest way that it was not intended to apply to the collection of charges for delivering water to property beyond the territorial limits of Baltimore. The suggestion that the situs of the debt is at the creditor's domicile is hardly in point. Salyers Auto Co. v. DeVore (1927) 116 Neb. 317, 217 N. W. 94, 56 A.L.R. 594; 2 R. C. L. 806, cited in support of the suggestion deal only with jurisdiction of courts over the res in attachment proceedings, they have no connection with the venue in ordinary actions of assumpsit between residents of the same state.

The courts of the city of Baltimore would obviously have no jurisdiction in such an action brought against a person residing in the state but beyond the city limits. Nor would the machinery provided for the enforcement of the payment of state and city taxes be applicable, whether the expression used be intended to apply to the collection of taxes in the city, or in one of the counties, or in the particular county in which the property served is located, since the city officials charged with the collection of taxes would have no official authority beyond the territorial limits of the city, and the county officials would be under no duty to act. Certainly there is no intention implicit in that statute that rent for water service to property lying in Baltimore county shall constitute a lien thereon, and since no other statute makes charges for water service supplied by the corporation to property beyond its territorial limits a lien thereon no lien on such property for such charges exists.

Certain ordinances of the city of Baltimore, Baltimore City Code, Art. 48, §§ 14, 27, 35, are cited apparently in support of the theory that the water charges constituted a lien on appellant's property, but obviously they have no extraterritorial force or effect beyond that which the rules and regulations of any public utility corporation would have. McQuillin on Mun. Corp. § 693; 43 C. J. 575; Dillon on Mun. Corp. §§ 627, 628. The authority granted to the city in its charter, Charter and

Pub. Loc. Laws of Baltimore City (Ed. 1927) § 6, subsec. 30(A), "to establish . . . a system of water supply for Baltimore city, and to pass all ordinances necessary in the premises," is, by the terms of the grant limited to Baltimore city, by the qualifying words "for Baltimore city."

[7, 8] It is further suggested that the appellant had the right to cut off its service to appellant's property for failure to pay all accrued charges thereon under certain rules of the Baltimore County Water Company. It is undisputed that the area in which appellant's property is located was formerly served by the Baltimore County Water Company, and it is apparent from an inspection of Chap. 82, § 17, Acts of 1918, that before extending its service into that territory the city was required to acquire the property of the Baltimore County Water Company in the area annexed by that act. It is also undisputed that the city did acquire the assets of that company which included the lines from which appellant's property was served. Obviously from that time the property thus acquired became integrated with the water supply system of the city, and was operated by it as a municipality and not as the corporate successor of the Baltimore County Water Company, for the municipality derives its powers from the Constitution of the state and the statutes enacted in pursuance thereof and not from the charters of private corporations. But on December 11, 1922, the water board of Baltimore city adopted a motion "that in so far as extensions and operations in Baltimore and Anne Arundel counties are concerned, the water department be conducted on the same basis as would any well operated public utility corporation; that the schedule and rules governing water supply service filed by the Baltimore County Water and Electric Co. on May 29, 1920, with the Public Service Commission be reaffirmed," with certain minor amendments. Among the rules of that company was the following:

"All contracts for water supply service shall be made for a period of one year and shall thereafter continue in force by renewal, without act or notice from either party to the other, from year to year." Page 2.

"In the event of any change in ownership of any premises connected to the system of the company for water supply service, the company shall be immediately notified, in writing, of such change, giving in such notice the name and address of the new owner, whereupon the company may, at its option, require the new owner to make application for water supply service in the same manner as is provided for new service connections; in the absence of such application by such new owner the use of the company's service may, at the option of the company, be taken and construed to be acceptance by such new owner of all the contract obligations of the preceding owner with and to the company, accruing from and after the date of change in ownership." Page 2.

"All contracts shall be subject to cancellation, at the option of the company, and service thereunder may be discontinued by the company, . . . unless all bills, accounts, and charges of the company have been paid, or until they are properly secured to the satisfaction of the company, whenever;

"Any owner refuses or neglects payment of any bill, account, or charge, for or on account of the premises." Pages 4, 5.

If the purpose and intent of these rules was to authorize the corporation to discontinue its service to property because the owner thereof failed or refused to pay the water rent due for service to a former owner, the rule was unreasonable and void, Title Guarantee & Trust Co. v. 457 Schenectady Avenue, *supra;* 28 A.L.R. 478; Waldron v. International Water Co. (1921) 95 Vt. 135, 112 Atl. 219, 13 A.L.R. 340; Etheredge v. Norfolk, *supra;* 27 R. C. L. 1455; McQuillin Mun. Corp. § 1824; Dillon, Mun. Corp. § 1321, but it is apparent from an examination of the rules that they were intended to grant no such authority. The rule last cited provides that in the event of a change of ownership of any premises connected with the company's water supply system, the company is to be notified of the change and that upon receipt of such notice it may at its option require a new application, and if the owner refuses to make such application, it may treat his acceptance of the service as acceptance of the contract obligations of the former owner "accruing from and after date of change of ownership," and the service may only be discontinued when "any owner" neglects payment of any charge "for or on account of the premises." The apparent meaning of that language is to make the owner of property liable for service to it while he owns it, not to make him liable for the debt of another for service to it when he did not own it. The same thing is true of another rule which authorizes a discontinuance of the service if the rates are in arrears for fifteen days.

These conclusions are consistent with the legislative interpretation of the several statutes and ordinances to which reference has been made which is manifested in Chap. 186, § 335, Acts of 1937, and Chap. 539, § 6, Acts of 1924, which while making certain other service charges a lien on the property served, expressly excepts water service charges.

[9] The petitioner bought the property in issue at a mortgage foreclosure sale. The sale was made under the power contained in a mortgage from a former owner to it, and by it assigned to Augustus A. Piper for foreclosure. That mortgage became in default on August 5, 1934, and remained in default thereafter. The mortgage contains a covenant that until default "the mortgagors shall possess the premises upon paying in the meantime all ground rent taxes and assessments, levies, public debts, and charges of every kind, levied or assessed or to be levied or assessed on said property, which ground rent, taxes, assessments, levies, public dues, charges, mortgage debt, and interest the mortgagors do hereby covenant to pay when legally demandable." The appellee contends that upon default the mortgagee became liable under that covenant for water rates charged against the mortgagors. In connection with that contention appellee avers that the covenant was unusually elaborate and comprehensive, and that some significance should be attached to that fact, but upon examination the covenant appears to be no different from that found in any well drawn mortgage, and its meaning is too clear to require construction.

There are several answers to appellee's contention. The first is that water rent, unless made so by statute, or by contract, is neither a ground rent, a tax, an assessment, a levy, a public debt, or a charge, and it is not made so in this case by either statute or contract.

Then there is no privity of estate between the mortgagors and the appellee. The mortgagee had no interest or concern in the mortgagors' indebtedness to general creditors, and the cases of Williams v. Safe Deposit & Trust Co. (1934) 167 Md. 499, 175 Atl. 331; Union Trust Co. v. Rosenburg (1937) 171 Md. 409, 189 Atl. 421; Gibbs v. Didier (1915) 125 Md. 486, 488, 94 Atl. 100, Ann. Cas. 1916E, 833, and Waring v. National Savings & Trust Co. (1921) 138 Md. 367, 114 Atl. 57, deal with a different situation and are not in point. In Williams v. Safe Deposit & Trust Co. *supra,* and Gibbs v. Didier, *supra,* the court was dealing with the liability of a mortgagee for rent payable by the mortgagor under the covenants of a lease of the mortgaged property, and in those cases the decisions rested squarely upon the privity of estate between the mortgagee as assignee of the term and the lessor. In Union Trust Co. v. Rosenburg, *supra,* and Waring v. National Savings & Trust Co. *supra,* the court was dealing with the obligation of a mortgagee to pay taxes accrued on the mortgaged property which were a lien thereon, within the express terms of the covenant of redemise and ran with the land. In this case there is no privity of estate, nor is there any covenant running with the land, and the relation between the city and the former owner of the land is merely that of debtor and creditor.

The petitioner therefore was under no obligation to pay the charges for services to the property which had accrued before he took title thereto by accepting a deed from the assignee, because those charges were not a lien on the land but a personal debt of the then owner and since appellant tendered payment of all charges accrued since it so took title, the tender should have been accepted and the service restored.

There was error therefore in dismissing appellant's petition, and it becomes necessary to reverse the order from which the appeal was taken, and remand the case for further proceedings.

Order reversed and case remanded for further proceedings in accordance with the views expressed in this opinion, with costs to the appellant.

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*CALIFORNIA RAILROAD COMMISSION*

# Re Electric Plant Accounts

[Decision No. 31618, Case No. 4379.]

*Accounting, § 14 — Retirements — Particular accounts.*

Retirements credited to elected transmission and distribution plant ac-

counts may be based on the average unit costs by groups of identical units and geographical areas, since, because of the larger number of small items of property that enter into transmission and distribution capital accounts, it may be impractical to determine the cost of each item of property.

[January 3, 1939.]

INVESTIGATION *on Commission's own motion to prescribe a list of units of property and accounting procedure relating to the retirement of investment in electric plant accounts; list established.*

APPEARANCES: R. W. Duval, E. W. Hodges, D. G. Martin, G. M. Thomas, J. S. Moulton, and A. B. Carpenter, for the Pacific Gas and Electric Company and San Joaquin Light and Power Corporation; C. P. Staal, F. C. McLaughlin and Valery White, for the Southern California Edison Company, Ltd.; Charles Grunsky, C. L. Kirksey and R. N. Dreiman, for Coast Counties Gas and Electric Company; R. C. Bragg, for the Vallejo Electric Light and Power Company; J. S. Bordwell, W. L. Sheppeard, and D. L. King, for The Nevada-California Electric Corporation; E. D. Sherwin and G. R. Gray, for the San Diego Consolidated Gas & Electric Company; M. D. Field and E. J. Rosenauer, for The California-Oregon Power Company; E. J. Ley and M. C. Sands, for the California Pacific Utilities.

By the COMMISSION: The Commission's order of November 28, 1938, reads in part as follows:

It is hereby *ordered* that Class A and Class B electrical corporations subject to the jurisdiction of the Railroad Commission of the state of California be, and they are hereby, given the opportunity to show cause, if any they have, why the Railroad Commission of the state of California should not prescribe, effective January 1, 1938, for said electrical corporations, a list of units of property and accounting procedure relating to the retirement of investment recorded in electric plant accounts similar to the list of units of property and accounting procedure contained in Exhibit A attached hereto, or prescribe the same with modification.

Public hearings were had in this matter before examiner Fankhauser on December 9th and on December 19th.

The Commission by Decision No. 30269 dated October 25, 1937 (21 P.U.R.(N.S.) 324) as amended by Decision No. 30339 dated November 15, 1937, in Case No. 4230 prescribed a uniform system of accounts for electrical corporations. Electric plant instruction 12 contained in said system of accounts reads in part as follows:

*"12. Additions and retirements of electric plant*

"A. For the purpose of avoiding undue refinement in accounting for additions to and retirements and replacements of electric plant, all property shall be considered as consisting of (1) units of property and (2) minor items of property.

"B. *Units of property.* Each utility may adopt its own list of units for the purpose of this instruction until such time as the Commission shall prescribe a list of units.

"(1) When a unit of property is added to electric plant, the cost thereof shall be added to the appropriate electric plant account, except that when units are acquired in the acquisition of any electric plant constituting an operating system, they shall be accounted for as provided in electric plant instruction 4.

"(2) When a unit of property is retired from electric plant, with or without replacement, the book cost thereof shall be credited to the electric plant account in which it is included, determined in the manner set forth in paragraph D, below. If the unit of property is of a depreciable class, the book cost of the unit retired and credited to electric plant shall be charged to the depreciation reserve provided for such property. (See Par. G, below, and also electric plant instruction 13.)

"C. *Minor items of property.* (1) When a minor item of property which did not previously exist is added to plant, the cost thereof shall be accounted for in the same manner as for the addition of a unit of property, as set forth in paragraph B (1), above, if a substantial addition results, otherwise the charge shall be to the appropriate operating expense account.

"(2) When a minor item of property is retired and not replaced, the book cost thereof shall be credited to the electric plant account in which it is included; and, in the event the minor item is a part of depreciable plant, the depreciation reserve shall be charged with the book cost and cost of removal and credited with the salvage. If, however, the book cost of the minor item retired and not replaced has been or will be accounted for by its inclusion in the unit of property of which it is a part when such unit is retired, no separate credit to the property account is required when such minor item is retired.

"(3) When a minor item of depreciable property is replaced independently of the unit of which it is a part, the cost of replacement shall be charged to the maintenance account appropriate for the item, except that if the replacement effects a substantial betterment (the primary aim of which is to make the property affected more useful, more efficient, of greater durability, or of greater capacity), the excess cost of the replacement over the estimated cost at current prices of replacing without betterment shall be charged to the appropriate electric plant account.

"D. *Determination of book cost.* The book cost of electric plant retired shall be the amount at which such property is included in the electric plant accounts, including all components of construction costs. The book costs shall be determined from the utility's records and if this cannot be done, it shall be estimated. When it is impracticable to determine the book cost of each item, due to the relatively large number or small cost thereof, the average book costs of the items, with due allowance for any differences in size and character, shall be used as the book cost of the items retired."

The objective sought by this proceeding is uniformity and accuracy in accounting for the retirement of prop-

erty without replacement and the retirement and replacement of property. The system of accounts provides that electrical corporations, hereinafter sometimes referred to as utilities, shall record the investment in their electric properties on the basis of original cost. Original cost is defined so as to mean the cost of such property to the person first devoting it to public service. When property is no longer used in rendering utility service, the cost thereof should be removed from the electric plant accounts. In the event that it must be replaced, the issue arises whether the cost of replacing the property should be charged to electric plant accounts or to operating expense accounts. It is the type of replacement and the cause thereof which determines whether it should be made through capital.

To establish units of property and then provide that replacements costing less than a stated amount may be charged to maintenance, of course, makes the stated amount the retirement unit. Retirement units will not be established by that method.

Some electric property should be retired on the basis of individual unit costs. Other electric property may be retired on the basis of average unit costs. The latter class of property comprises property, the cost of which is charged to the follow accounts:

*Transmission Plant*

344 Towers and Fixtures
345 Poles and Fixtures
346 Overhead Conductors and Devices
347 Underground Conduit
348 Underground Conductors and Devices

*Distribution Plant*

354 Poles, Towers, and Fixtures
355 Overhead Conductors and Devices
356 Underground Conduit
357 Underground Conductors and Devices
358 Line Transformers
359 Services
360 Meters
363 Street Lighting and Signal System

Because of the large number of small items of property that enter into said transmission and distribution capital accounts, it may be impractical to determine the cost of each item of property. Therefore, retirements credited to said transmission and distribution plant accounts may be based on the average unit costs by groups of identical units and geographical areas. This cost should be determined from the records of the utilities of their predecessors. Upon sufficient showing, the Commission will authorize utilities to estimate the average unit costs of said transmission and distribution capital installed prior to the effective date of this order and will indicate the period of time to be used in determining said average unit costs.

All costs of additions and betterments to said transmission and distribution capital installed after the effective date of this order shall be analyzed annually by the utilities. From such analysis they shall prepare average unit costs for the various units to be used for retirement purposes.

ORDER

The Commission having considered

the evidence submitted in this proceeding and it being of the opinion that it should prescribe a list of units of property for the purpose set forth in instruction 12 of the electric plant accounts contained in the uniform system of accounts for electrical corporations presently in effect and for other purposes set forth in said system of accounts, therefore,

It is hereby *ordered* that the Railroad Commission of the state of California hereby adopts and prescribes, effective fifteen days after the date hereof, for Class A and Class B electrical corporations, the units of property contained in Exhibit A attached hereto and made a part hereof.

It is hereby *further ordered* that retirements from the transmission and distribution accounts listed in the foregoing opinion, if not made on an individual basis, shall be made on annual average unit cost basis by groups of identical units and geographical areas. Such costs shall be determined from the records of said electrical corporations or their predecessor. Upon sufficient showing, the Commission will authorize exceptions, in individual cases, for installations made prior to the effective date of this order.

All costs of additions and betterments to said transmission and distribution accounts installed after the effective date of this order, shall by said electrical corporations, be analyzed annually, and said electrical corporations shall from said analysis, prepare average annual unit costs for the purpose of retiring the cost of units of property charged to said transmission and distribution accounts.

It is hereby *further ordered* that said units of property may be expanded by any public utility without authorization from the Commission, but such units of property may not be condensed without the Commission's authorization except where two or more units are physically combined as integral parts of one piece of equipment.

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*MARYLAND COURT OF APPEALS*

# O. E. Weller et al. Constituting the Public Service Commission

*v.*

# Kolb's Bakery & Dairy, Incorporated

[Nos. 21–23.]

(— Md. —, 4 A. (2d) 130.)

*Motor carriers, § 11 — Jurisdiction of Commission — Hauling one's own property.*

1. The Commission has no jurisdiction over the transportation of one's

own property, since a person hauling his own property for himself is neither a common carrier not a public carrier for hire, p. 39.

*Commissions, § 17 — Special grants of power — Limited jurisdiction.*

2. The Commission, acting under a specially conferred grant of power by the legislature, exercises only a limited jurisdiction, and where a jurisdiction is so limited, it will be strictly construed, p. 39.

*Consolidation, merger, and sale, § 1 — Delivery.*

3. Delivery, pursuant to sale of personalty, is the act whereby the seller parts with his possession and title and the buyer acquires the possession and title, p. 39.

*Consolidation, merger, and sale, § 59.1 — Passing of title — Method of determining price.*

4. It is not essential that a price shall be fixed or stated definitely in a contract of sale, where a method for definitely ascertaining it is agreed upon, as respects the passing of title to personalty which has been sold, p. 39.

*Consolidation, merger, and sale, § 59.1 — Passing of title.*

5. That a vendee of personalty has the right to refuse the merchandise delivered if it does not meet the test previously agreed upon is a conclusive indication that the title does not pass until opportunity for making the test has been afforded, p. 39.

*Public utilities, § 38 — Hauling for self — Motor transportation.*

6. A dairy company which has notified its producers that upon loading milk upon its trucks the milk becomes its property and that any subsequent loss will be the dairy company's loss, although price was to be determined subsequently by butter fat test, is not hauling milk for hire in violation of the Public Freight Motor Vehicle Law, since it is actually hauling its own milk from producers' farms to its place of business, p. 39.

[February 2, 1939.]

APPEAL *from decree enjoining the Commission from preventing plaintiff's hauling milk from producers' farms to its place of business; affirmed.*

Argued together before Bond, C. J., and Offutt, Sloan, Mitchell, Shehan, Johnson, and Delaplaine, JJ.

APPEARANCES: J. Purdon Wright, of Baltimore, for appellants in No. 21; David G. McIntosh, Jr., of Baltimore (McIntosh & Thrift, of Baltimore, on the brief), for appellant in No. 22; Francis Key Murray, of Baltimore, for appellant in No. 23; Howard C. Bregel and Malcolm J. Coan, both of Baltimore (Bruce T. Bair and James E. Boylan, Jr., both of Westminster, on the brief), for appellee in all three cases.

DELAPLAINE, J.: This is an appeal from a decree of the circuit court for Carroll county enjoining the Public Service Commission of Maryland from enforcing an order which would prevent Kolb's Bakery and Dairy, Inc., the appellee, a corporation located in Baltimore in the business of pasteurizing, bottling, and selling milk, from "collecting, hauling, and conveying to

its dairy by its own motor vehicle transportation its fluid milk supply which is purchased from the producers of milk whose farms are located along the routes served by the interveners, Wilbur F. Miller, trading as Snyder's Express, and the Tidewater Express Lines, Inc., under subsisting permits heretofore issued by said Commission."

Miller, trading as Snyder's Express, a carrier authorized to haul freight by motor truck, filed a complaint with the Commission under Code Supp. Art. 56, § 262A, alleging that the appellee had been picking up milk of shippers on his franchise route and hauling the milk without a permit, thereby infringing unlawfully on the rights granted to him by the Commission. The Tidewater Express Lines, Inc., another carrier, intervened as a complainant in the proceedings. The Commission held that the motor vehicle operations complained of were subject to the Public Freight Motor Vehicle Law, and ordered the appellee to cease the operations.

The dairy company thereupon filed a bill of complaint under Code, Art. 23, § 404, praying that the Commission be enjoined from enforcing its order. Miller and the Tidewater company intervened as defendants. The defendants filed combined demurrers and answers to the bill of complaint. No testimony was offered other than the record before the Commission. The court overruled the demurrers and issued the injunction sought by the dairy company.

The question in this case is whether the dairy company was hauling its own milk, or whether it was engaged in hauling milk *for hire*. The company insisted that its driver purchased the milk from the producer at the farm. Up until June 30, 1938, the driver made an inspection of the milk for odor and appearance as well as for temperature; but after the health department of Baltimore City ordered the company to stop removing lids from the cans until after they arrived at the dairy, the company addressed a letter to the producers, announcing that after June 30, 1938, the driver would merely test the milk for temperature by feeling the outside of the can. The company stated in this letter: "Upon loading the milk on our truck it becomes our property, and any loss that may thereafter occur through spoilage, accident, or in the event the milk should turn out to be bloody or of bad odor, it will be *our* loss. . . . We want it understood, all reports to the contrary, that we are not engaged in the transportation business, but are purchasing our milk from you at your farm to assure ourselves not only of the quality of the milk that we use at the dairy, but for the further reason that we desire to pick out the person with whom we deal."

It is clear from the announcement that the company's purpose was to buy the milk from the producers at the farm. There was testimony indicating that, prior to June 30, 1938, some milk with garlic or other defects had not been paid for by the company; however, any such defects were waived by the positive language of the letter to the producers. After that time any loss occurring after the milk was loaded on the truck was the loss of the dairy company.

Reliance was placed by the appellants upon the decision of this court in

Public Service Commission v. Western Maryland Dairy Co. (1926) 150 Md. 641, P.U.R.1927B, 524, 135 Atl. 136; but in that case the milk was consigned to the Maryland State Dairymen's Association, with a fixed charge for transportation according to zones, and the milk was then sold by the association to the dealers, including the Western Maryland Dairy. The amount of milk to be purchased was not ascertained until after it reached the dairy. If any of the milk was not satisfactory, it was returned to the producer. In that case, as well as in Public Service Commission v. Tidewater Express Lines (1935) 168 Md. 581, 179 Atl. 176, the milk was the property of the producer while in transit, and the title did not pass until it was accepted at the buyer's plant.

**[1, 2]** The jurisdiction of the Public Service Commission has included "any common carrier operating or doing business within the state." Code, Art. 23, § 350. By a later statute, Acts of 1924, Chap. 291, the jurisdiction has been extended to "each owner of a motor vehicle to be used in the *public* transportation of merchandise or freight," and to "corporations, groups of individuals, and associations engaged in the transportation of freight or merchandise of their stockholders, shareholders, or members whether on the coöperative plan or otherwise." Code, 1935, Supp. Art. 56, §§ 258, 259. A coöperative association hauling freight for its members for hire, even though not a common carrier, has been held to be a public carrier, subject to the Public Freight Motor Vehicle Law. Parlett Coöperative v. Tidewater Lines (1933) 164 Md. 405, 165 Atl. 313. But there is no statute vesting in the Public Service Commission authority to exercise jurisdiction over the transportation of one's own property. A person hauling his own property for himself is neither a common carrier nor a public carrier for hire. The Public Service Commission, acting under a specially conferred grant of power by the legislature, exercises only a limited jurisdiction, and where a jurisdiction is so limited, it will be strictly construed. Benson v. Public Service Commission (1922) 141 Md. 398, P.U.R.1923B, 424, 118 Atl. 852.

**[3–6]** In this case the dairy company agreed to pay for the milk at the rate of 20 cents per gallon for milk testing 4 per cent butter fat, with an increase or decrease of one-half a cent for every point of rise or fall in the percentage of butter fat. The fact that the test established the amount due to to the producer did not alter the time of delivery. Delivery is the act by which the seller parts with his possession and title, and the buyer acquires the possession and title. 18 C. J. 478. It is not essential that a price shall be fixed or stated definitely in a contract, where a method for definitely ascertaining it is agreed upon. 55 C. J. 68. Thus, in Farmers' Phosphate Co. v. Gill (1888) 69 Md. 537, 16 Atl. 214, 1 L.R.A. 767, 9 Am. St. Rep. 443, where there was an agreement that a shipment of phosphate should be weighed and its quality tested upon its arrival at the buyer's plant, the court held that the passing of the title was not deferred until these acts were performed, as the buyer had no right under the contract to reject the shipment if it did not meet the prescribed standard, but in such an event he was mere-

ly allowed a proportionate abatement of the price. If the buyer has the right to refuse the merchandise delivered in the event it does not meet the test, then there is conclusive indication that the title does not pass until opportunity for making the test has been afforded. Agri Mfg. Co. v. Atlantic Fertilizer Co. (1916) 129 Md. 42, 98 Atl. 365, Ann. Cas. 1918D, 396. But in the present case the driver of the motor truck purchased the milk as the agent for the dairy company, the ownership of the milk passed when it was placed on the truck, and any milk which was defective was the company's loss. Obrecht v. Crawford (1938) — Md. —, 2 A. (2d) 1.

The question here is whether the order of the Public Service Commission is "unreasonable or unlawful, as the case may be." Code, Art. 23, § 408. The question for us to decide is whether the order is an unlawful application of the provisions of §§ 258 and 259 of Art. 56 of the Code Supp., and we conclude as a matter of law that Kolb's Bakery and Dairy, Inc., appellee, is not operating in violation of these provisions.

Decree affirmed, with costs to the appellees in Nos. 22 and 23.

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*PENNSYLVANIA PUBLIC UTILITY COMMISSION*

# Public Utility Commission

*v.*

# Acme Natural Gas Company et al.

[Complaint Docket No. 11380.]

*Commissions, § 39 — Jurisdiction — Corporation operating ultra vires.*

1. The mere fact that a corporation in selling natural gas for fuel purposes, when not authorized to engage in such business under its charter, is functioning ultra vires does not preclude the Commission from exercising jurisdiction over the corporation, p. 41.

*Commissions, § 13 — Jurisdiction — Estoppel to deny.*

2. The principle that a party invoking the jurisdiction of a court for affirmative relief is estopped from later attacking the jurisdiction of the court also applies to a proceeding before an administrative board, p. 43.

*Certificates of convenience and necessity, § 11 — Jurisdiction of Commission — Estoppel.*

3. A gas company which has applied to the Commission for a certificate of convenience and necessity is estopped from denying the Commission jurisdiction to determine convenience and necessity, p. 43.

*Public utilities, § 44 — Tests of status — Submission to regulation.*

4. That a gas company applied to the Commission for a certificate of convenience and necessity and that it has, each year of its existence, filed its

annual report with the Commission as is required of all public utilities are strongly persuasive that such company considered itself a public service company, subject to the jurisdiction of the Commission, p. 43.

*Public utilities, § 26 — Status of company furnishing gas under contracts.*

5. A gas company serving all who apply, to the extent of its ability and resources, pursuant to lease agreements whereby all gas furnished over a specified amount is charged for, is engaged in serving the public, and, as to the lease agreements, is subject to regulation in every instance where there is a consumption of gas beyond lease reservation amounts, p. 44.

*Public utilities, § 39 — What constitutes public service — Sales to industrial consumers.*

6. A gas company's sale of natural gas to industrial consumers constitutes a sale of gas to the public, p. 44.

*Public utilities, § 42 — Status of company — Determining factors.*

7. The volume of a gas company's business that is attributable to other than sales to utility companies for redistribution is persuasive of its status as a public utility, p. 46.

*Public utilities, § 24 — What constitutes public service — Service rendered under contract.*

8. That all service rendered by a natural gas company is under individual contracts does not make its operations private in character, p. 47.

[February 14, 1939.]

INVESTIGATION *of natural gas company rates; petition for dismissal of complaint on jurisdictional grounds denied.*

By the COMMISSION: On April 20, 1937, the Commission, on its own motion, began an investigation of rates of all Pennsylvania natural gas companies, of which Duquesne Natural Gas Company, respondent, is one. Respondent, raising the jurisdictional issue, was granted leave to file an answer in support of its contention. The matter is now before us upon the answer and petition to dismiss.

Respondent alleges: That it is primarily engaged in the production of natural gas and oil; that it sells the majority of its gas to seven natural gas distributing companies (one of which, the Victor Gas Company, is wholly owned by respondent), and two industrial consumers (Westinghouse Electric and Manufacturing Company and the Houston-Starr Company, successor to Wynn Brick Company) under contracts; that other consumers, including those connected with leaseholds, and the borough of Trafford, Westmoreland county, are served merely to advance its principal purpose of selling wholesale to the above consumers; that it is not incorporated to serve the public and does not serve nor hold itself out to serve the public; that its business is not affected with a public interest, but is restricted to its charter power under the General Incorporation Act of 1874; that all of its relations with its consumers are by contract. Respondent, therefore, contends that it cannot properly be classified as a public utility within the contemplation of the Public Utility Law.

[1] An inspection of respondent's

charter reveals that it was incorporated under the Corporation Act of April 29, 1874, P. L. 73, but it has been established that a company cannot be incorporated under that act to serve natural gas for fuel purposes. Emerson v. Com. ex rel. Attorney General (1884) 108 Pa. 111; Re Sterling's Appeal (1886) 111 Pa. 35, 2 Atl. 105. If respondent be classified as a mining corporation, its proper operations would be limited to supplying gas for use in the manufacture of wire, steel, or any other product. However, the fact that a corporation is functioning ultra vires in rendering service to the public does not preclude our jurisdiction. Pennsylvania Chautauqua v. Public Service Commission, 105 Pa. Super. Ct. 160, P.U.R.1932D, 145, 160 Atl. 225. See Beetem v. Carlisle Light, Heat & P. Co. 273 Pa. 82, P.U.R.1922D, 258, 116 Atl. 676; Lloyd v. Haugh & K. Storage & Transfer Co. (1909) 223 Pa. 148, 72 Atl. 516, 21 L.R.A.(N.S.) 1188.

The question of our jurisdiction over respondent's rates rests, therefore, upon the terminology of the Public Utility Law and the actual conduct of respondent's business.

Article I, § 2, clause 17, subsections (a), (e), and (g–c) of the Public Utility Law (66 PS § 1102) define a public utility as follows:

" 'Public utility' means persons or corporations now or hereafter owning or operating in this commonwealth equipment, or facilities for:

(a) Producing, generating, transmitting, distributing, or furnishing natural or artificial gas, electricity, or steam for the production of light, heat, or power to or for the public for compensation; . . .

(e) Transporting or conveying natural or artificial gas, crude oil, gasoline, or petroleum products, materials for refrigeration, or other fluid substance, by pipe line or conduit, for the public for compensation; . . .

"The term 'public utility' shall not include . . . (c) any producer of natural gas not engaged in distributing such gas directly to the public for compensation."

The purpose clause of respondent's charter shows an intent to sell to the public since it carries no concept of limitation as to consumers to be served. It states, inter alia, that "The said corporation is formed for the purpose of mining, drilling, boring for, and producing petroleum, oil, natural gas, and other mineral and substances incidentally developed, and manufacturing, buying, selling, trading, and dealing in the products and by-products thereof; . . .

The Duquesne Gas Corporation, predecessor of respondent, incorporated and commenced business without applying to the Public Service Commission for a certificate of public convenience. That Commission instituted an inquiry and investigation upon its own motion into the status of the company and its failure to comply with the provisions of the law applicable to public service companies (Public Service Commission v. Duquesne Gas Corp. C. 8899). Subsequently, the company defaulted in the payment of its bond interest. On petition of certain bondholders and the trustees under the 6 per cent first mortgage bonds, the district court of the United States appointed a receiver. Thereafter, a reorganization committee made application for letters patent

with the secretary of the commonwealth under and by virtue of the provisions of an act entitled, "An Act to Provide for the Incorporation and Reorganization of Certain Corporations," approved the 29th day of April, 1874, and the several supplements thereto. The secretary of the commonwealth certified to the Commission a copy of the application for letters patent.

[2–4] Under date of January 11, 1933, the Duquesne Natural Gas Company presented a petition for approval of its incorporation, organization, and creation to the Public Service Commission (A. 25134–1933, Folder No. 1), reciting that letters patent had been granted; that the proposed corporation was organized for the purpose of acquiring the properties of the Duquesne Gas Corporation; that the business of the proposed company would consist mainly in operating and developing natural gas wells on the property now owned or leased by the said Duquesne Gas Corporation and selling the said gas at wholesale to natural gas distributing companies, municipalities, and certain industrial users through distributing lines of other public service corporations; that no other corporation, partnership, or individual was furnishing or had the corporate or franchise right to furnish service similar to that of the proposed company in the territory in which it proposed to operate; that no competitive condition would be created by said company, that all capital stock of the proposed company would be issued in accordance with a plan of reorganization attached as an exhibit; that the Commission was referred to proceedings before it in the inquiry and investigation against the Duquesne Gas Corporation in reference to the method of operation of that corporation, which would, subject to the Commission's supervision, be continued by the proposed company; that the proposed public service company was necessary for the service, accommodation, and convenience of the public because it proposed to operate and further develop the gas properties proposed to be acquired by it, and distribute its product to the public, principally through the lines of other affiliated gas distributing companies, and the lines of Victor Gas Company, an affiliated company.

It was prayed that the Commission issue a certificate of public convenience, under the provisions of Art. III, § 2 (a) and Art. V, §§ 18 and 19 of the Public Service Company Law, evidencing its approval of the incorporation, organization, and creation of the Duquesne Natural Gas Company.

The Public Service Commission, on March 6, 1933, issued its certificate of public convenience approving the application of the Duquesne Natural Gas Corporation (A. 25134–1933, Folder No. 1).

By later petition (A. 25134–1933, Folder No. 2), respondent applied to the Public Service Commission under § 2 (b), Art. III and §§ 18 and 19 of Art. V of the Public Service Company Law, for approval of the right to begin business, and the Commission, by its certificate issued June 19, 1933, granted approval of the beginning of the exercise of the right, power, and privilege of supplying natural gas to the Westinghouse Electric and Manufacturing Company, Pittsburgh

Plate Glass Manufacturing Company, Wynn Brick Company and 25 domestic consumers located in Westmoreland, Washington, Allegheny, Armstrong, and Greene counties, and at wholesale to the Bellewood and Monongahela City Natural Gas Company, Manufacturers Light and Heat Company, Peoples Natural Gas Company, and Victor Gas Company.

Respondent has thus, by its applications for certificates of public convenience, conceded its character as a public service company, and has submitted itself to the jurisdiction of the Commission over a period of years. Furthermore it has, each year of its existence, filed its annual report with the Commission as is required of all public utilities.

It has been established that a party invoking the jurisdiction of a court for affirmative relief is estopped from later attacking the jurisdiction of the court. Smith Engineering Co. v. Pray (1932) 61 F. (2d) 687; certiorari denied (1933) 289 U. S. 733, 77 L. ed. 1482, 53 S. Ct. 594; Miller v. Pyrites Co. (1934) 71 F. (2d) 804; certiorari denied (1934) 293 U. S. 604, 79 L. ed. 696, 55 S. Ct. 121; rehearing denied (1934) 293 U. S. 632, 79 L. ed. 717, 55 S. Ct. 208; Re Farber (1932) 260 Mich. 652, 663, 245 N. W. 793; Federal Land Bank v. Gladish (1928) 176 Ark. 267, 2 S. W. (2d) 696.

Such an estoppel also applies to a proceeding before an administrative board. Re Lawrence Park Heat, Light & P. Co. (N. Y. 1925) P.U.R. 1926B, 125, 146. It was further held in Re Washtenaw Gas Co. (Mich. 1938) 23 P.U.R.(N.S.) 226, 237, that, where a gas company applies to the Commission for a certificate of convenience and necessity, it is estopped from denying the Commission jurisdiction to determine convenience and necessity.

The foregoing facts are strongly persuasive that respondent considered itself a public service company, subject to the jurisdiction of the Public Service Commission.

At the hearing in this matter respondent's attorney asked to amend the prayer of its answer to include a prayer for permission to withdraw its applications before the Commission at Application Docket No. 25134, Folders 1 and 2, for certificates of public convenience, evidencing the approval of its charter and of its right to begin business and further asked that the Public Utility Commission cancel the certificates issued by the Public Service Commission. We are unable to regard this request seriously, particularly since it comes approximately six years after the issuance of the certificates. It remains to be considered whether respondent has actually held itself out to serve the public, and does, in fact, serve the public, and whether it comes within exceptions stated in the Public Utility Law.

**[5, 6]** Article I, § 2, clause 17 (g–c) of the Public Utility Law excludes as a "public utility" a producer of natural gas not engaged in distributing such gas directly to the public for compensation. This portion of the act would exclude from our jurisdiction a producing natural gas company that was engaged solely and entirely in wholesaling gas to other companies for distribution. Respondent wholesales gas to several distributing companies, one of which, the Victor

Gas Company, is a wholly owned subsidiary of respondent. These distributing utility companies, seven in number, consume 64 per cent of respondent's output. If respondent's entire business consisted of such disposal of its product, and leaving out of consideration the issue of distribution by a wholly owned subsidiary of the producer, the Commission could decide that respondent was not subject to its jurisdiction. But this is not the situation.

Of respondent's remaining output, approximately 35 per cent is delivered to two industrial consumers, the Westinghouse Electric and Manufacturing Company and the Houston-Starr Brick Company. The remaining gas output, or a portion thereof, is consumed by 26 parties under various contract arrangements. The borough of Trafford receives gas for its town hall under an arrangement whereby 300,000 cubic feet of gas is furnished free, but amounts in excess thereof are charged for. It is stated in the record that this arrangement was originally reached as a result of bargaining for the laying of gas lines through the borough of Trafford.

Gas is likewise supplied to Mrs. A. K. Slusser, a resident of Trafford, who receives no free gas, but pays according to the amount consumed. It is stated in the record that this arrangement grew out of the fact that Mrs. Slusser's husband was the former president of Trafford Oil and Gas Company, one of respondent's antecedent companies.

Sixteen of the consumers lease gas lands to respondent, and have reservations or conditions in their leases which entitle them to a limited amount of free gas. In each instance, a charge is made for gas in excess of the reserved amount.

In three of the leases, namely, J. C. Carter, Institute of Practical Arts, and Oscar Rottiers, gas for use on the premises is sold at the prevailing field price with no free gas provisions. The Peter Keyock lease entitles him to no free gas, and he is charged for all gas used.

Rene Veerkleeren was given free gas for one dwelling. Subsequently, he built another dwelling, and the company applied to the Commission for approval of the right to serve the second house (A. 25134–1933, Folder No. 1). The Commission permitted it to serve the tenant house at the price stipulated in the application.

N. C. Brown maintained a barbecue stand and filling station, and the company agreed to serve him at a stipulated price, depending upon the amount consumed. It is testified in the record that this was a good will gesture, inasmuch as respondent's predecessor had maintained a meter house upon the premises.

Earl Smith had a lease agreement which provided for no free gas. The company subsequently ordered him to disconnect, but when he threatened action they agreed to supply him gas at a stipulated price.

W. B. McWilliams was supplied free gas for one dwelling house. Investigation showed that the gas was being used in a garage for general purposes, and respondent thereafter entered into a sale agreement with him for gas at a stipulated price.

The record and testimony in this case discloses that respondent actually serves some twenty-six domestic or

industrial patrons and two industrial consumers substantially to the extent of its ability and resources. The language used in the lease agreements, letters, and contracts of the company shows an intention to serve all applicants to the extent of its ability. There is no substantial evidence that respondent has refused service to any applicant.

Extracts from the lease agreements and letters from respondent give an insight into its intention and conduct. In the Shough lease it is stipulated that "Any gas used by the lessor in excess of the said 150,000 cubic feet per year shall be paid for by the lessor at the then published rate of the lessee"; the J. A. Carpenter lease states, "Any gas used by the lessor in excess of 200,000 cubic feet per year shall be paid for by the lessor at the prevailing rate charged domestic consumers by the lessee at the time such gas is used"; the Carter lease provides: "Said gas so used, however, to be paid for at the wholesale rate by the tenants or parties occupying the said dwelling houses." These leases are illustrative of the general nature of respondent's relation with the portion of the public that it serves. They indicate that respondent serves all those who apply, and that respondent has a prevailing rate at least for domestic consumers.

To the same effect is the Institute of Practical Arts lease, which states that gas is to be paid for at the wholesale rate by tenants or parties occupying the dwelling house, Further, the parties to the Institute of Practical Arts lease appointed an agent for the sale of all gas produced under the lease, thereby indicating that the company would accept any customers chosen by the agent.

A letter dated May 11, 1937, from the treasurer of the Duquesne Gas Corporation to Mr. Veerkleeren, indicates that the company had a regular form to be used by applicants for gas service, and also implies that respondent is a public utility by the following words: "Enclosed copy of form of application for gas service . . . giving particular attention to the first question concerning the nearest gas line of any other public utility."

In the W. B. McWilliams lease it is stated that, for all gas in excess of 200,000 cubic feet, which is reserved to the parties of the first part, the party of the first part agrees to pay monthly, the "regular established rates of the party of the second part for the supply of gas to domestic consumers." We, therefore, conclude that respondent is engaged in serving the public in these instances, and furthermore, as to lease arrangements, is subject to regulation in every instance where there is a consumption of gas beyond lease reservation amounts. Further, we hold that the sale of gas to the industrial consumers constitutes a sale of gas to the public.

The financial return from the disposal of respondent's product to other than utility companies constitutes a substantial part of its total business. In 1937, respondent's sale of gas to other than utility companies brought revenues of $90,810.38 as against revenues from the sale of gas to utilities of $165,559.71.

[7] The volume of respondent's business that is attributable to other than sales to utility companies for re-

distribution is persuasive of its status as a public utility.

The promoters and incorporators of Trafford Oil and Gas Company (one of respondent's predecessors) before starting in business, solicited the business of Westinghouse Electric and Manufacturing Company and the Wynn Brick Company (now Houston-Starr Brick Company) and thereafter took on other consumers. It is clearly to be seen that the words of the charter evidence an intent to sell to the public at large, since they carry no concept of limitation as to consumers to be served, and such intent has been carried out in practice.

A persuasive case on this matter is State ex rel. Bricker v. Industrial Gas Co. (1937) 58 Ohio App. 101, 16 N. E. (2d) 218, 222.

The court, in that case, in affirming a judgment holding that a gas company supplying natural gas to industrial customers and a few domestic consumers for profit under private contracts, was liable as a public utility for the payment of excise taxes, penalties, and maintenance fees, even though it had not exercised the right of eminent domain, nor accepted public franchises and did not furnish its product to the general public indiscriminately, said (58 Ohio App. at p. 109):

"The conduct of the defendant company raises a strong presumption that it is a public utility. This is evidenced by the purpose clause of the articles of incorporation of the company, its reports of gross receipts as a public utility, and payment of taxes as such utility, application to the Public Utilities Commission to buy property of other public utilities, handling natural gas, application for increased rates for service; use of public property for its lines and the distribution and sale of its products to its patrons, both industrial and domestic; its acquiescence by failure to prosecute appeal in an order of the Public Utilities Commission made upon the theory that it was a public utility. There has been no change in its purposes and activities according to the record, but it is insisted that it never was a public utility. It asserts that it has not used its right of eminent domain, although it concedes that it has the use of public streets and ways, secured by private contract. It seems to us that, when it voluntarily brought itself within a classification which would have permitted it to exercise its rights of eminent domain had it been necessary, that this is convincing evidence that it was a public utility, though standing alone not controlling. Having the right to exercise this unusual prerogative may have materially assisted in its consummation of private contracts."

[8] The fact that all service rendered by respondent is under individual contracts does not make its operations private in character. Erb v. Public Service Commission (1928) 93 Pa. Super. Ct. 421; James v. Public Service Commission (1935) 116 Pa. Super. Ct. 577, 9 P.U.R.(N.S.) 398, 177 Atl. 343.

Our review of the record, disclosing the above facts, leads us inevitably to the conclusion that respondent is a public utility.

*WASHINGTON DEPARTMENT OF PUBLIC SERVICE*
*DIVISION OF TRANSPORTATION*

# Department of Public Service

*v.*

# Centennial Flouring Mills Company

[M. V. Order No. 30648, Hearing No. 1765.]

*Motor carriers, § 3 — Limited contract carriers.*

1. A manufacturer who delivers his own products to customers and who receives compensation for delivery by means of a price differential is a limited contract carrier and as such must receive Commission authority to operate, and he must abide by Commission's rules and regulations as to insurance, filing of reports, and compliance with safety rules and regulations, p. 51.

*Rates, § 425.1 — Contract motor carriers — Price differentials.*

2. A limited contract motor carrier need not charge common carrier rates where it does not recover the total cost of transportation by means of price differentials, where the differentials are affected by competition, and where such operation does not unreasonably endanger the stability of rates of other carriers and the essential transportation service involving the movement of commodities by other types of carriers, p. 51.

[February 21, 1939.]

PROCEEDING *instituted by the Commission on its own motion to ascertain whether respondent is operating as a common or contract carrier without authority to do so; held to be a contract carrier and ordered to comply with applicable laws.*

By the DEPARTMENT: This matter came on regularly for hearing at Spokane, Washington, on the 29th day of December, 1938, pursuant to notice duly given, before Ralph J. Benjamin, supervisor of transportation.

The parties were represented as follows: W. E. McCroskey, Attorney, Seattle, for the Department of Public Service; M. V. Kelley, Attorney of Messrs. Witherspoon, Witherspoon and Kelley, Spokane, for the Centennial Flouring Mills Company; J. W. McCune, Traffic Manager, Tacoma, for the Tacoma Chamber of Commerce; R. B. Lytle, Tacoma, for the North Pacific Millers Association (except Centennial Flouring Mills Company); M. D. Moon, Traffic Manager, Harbor Island, Seattle, for the Fisher Flouring Mills Company; O. W. Hardesty, Traffic Manager, Seattle, for the Centennial Flouring Mills Company; R. P. Carolus, District Supervisor, Spokane, for the Pacific Inland Tariff Bureau.

Witnesses were sworn and exam-

ined, documentary evidence was introduced, and the Department, being fully advised in the premises, makes and enters the following:

*Findings of Fact and Opinion*

This proceeding was instituted by the Department of Public Service of Washington on its own motion under authority of § 15, Chap. 184 of the Laws of 1935, as amended by § 13, Chap. 166 of the Laws of 1937. Section 15, Chap. 184 as amended (Rem. Rev. Stats. § 6382–15) reads as follows:

"Section 15. Whether or not any motor vehicle is being operated upon the highways of this state within its proper classification, as defined by § 2 of this act, shall be a question of fact to be determined by the Department. Whenever the Department believes that any person, firm, or corporation operating motor vehicles on the highways of this state is not operating within the proper classification, but is in fact a carrier of a different classification, it may institute a special proceeding, upon ten days' notice, requiring such person, firm, or corporation to appear before the Department at a location convenient for witnesses and the production of evidence, and bring with him books, records, accounts, and other memoranda, and give testimony under oath as to his operations, and the burden shall rest upon such person of proving that his operations are properly classified under the provisions of this section. The Department may consider, in determining whether such operation is properly classified, the frequency of operation, amount and basis of compensation, whether title to property has been taken merely for the period of transportation or until delivery thereof at the point of destination, whether the carrier is regularly engaged in the buying and selling of the property transported as his principal business, whether an increased selling price assignable to the cost of transportation is charged for the property transported when delivered at the point of delivery as compared with the price charged when delivered at the point of shipment, and such other facts as indicate the true nature and extent of such operation and the receipt of compensation therefor, and all other facts that may indicate the true nature and extent of such operation upon the highways of this state and the receipt of a compensation therefor in order to determine the carrier's proper classification under the terms of this act. . . ."

The complaint and order to show cause issued by this Department alleged:

1. That respondent has engaged in the transportation business as a "common" or "contract" carrier without having applied for or received either a common or contract carrier permit as required by Chap. 184 of the Laws of 1935, as amended by Chap. 166 of the Laws of 1937, before engaging in such transportation.

The Centennial Flouring Mills Company, hereinafter referred to as respondent, owns and operates a flouring mill in the city of Spokane, Washington, and is engaged in the purchase of grain, the manufacture of flour and flouring products, and sale of same.

Respondent owns and operates a fleet of motor trucks over the highways of this state. These trucks, the record shows, are used for the purpose

of transporting various supplies and materials to respondent's mills and for the delivery of flour and grain products to purchasers in eastern Washington and parts of Montana, Oregon, and Idaho. This Department is not concerned, however, with the trucking operations of respondent outside of the state of Washington.

It is plain from the record in this case that respondent, in making deliveries of flour and grain products to its customers, transports its own products in its own trucks, and that said products so transported are being sold by respondent in good faith.

Respondent maintains a schedule of prices on various grain products which it processes at Spokane. There is a mill price, subject to fluctuation due to a number of factors which need not concern us. Flour and other allied products may be bought at respondent's mill at the going price but no discount or allowance is made to any purchaser who may elect to send his own truck to the mill to take delivery. Likewise, no charge over and above the mill price is made to purchasers in the Spokane area if respondent makes such deliveries in its own trucks.

Respondent sells its products in Grand Coulee, Colville, Pullman, and many other towns of eastern Washington. In most instances such sales are made at prices higher than the mill-door price in Spokane, although the record contains evidence and exhibits proving that in many cases sales are made and delivery is performed by respondent in its own trucks at the Spokane mill-door price.

When competitive conditions permit, respondent maintains a price differential, selling its products at various prices higher than those in effect at the mill door in Spokane.

There are exhibits in this record which show the various differentials in price. There is also testimony of respondent's manager that these differentials are upheld whenever possible.

Respondent prefers to transport its flour and other grain products to its customers because special handling and special services not performed by either common or contract carriers are required. The flour must be properly loaded and carefully stacked in customers' buildings on delivery. It is also necessary for respondent's drivers to pile its products farther than 20 feet from the truck tail gate on delivery and on occasion arrange advertising displays. Regular carriers do not do these things.

It is the contention of respondent that it keeps no transportation cost figures, that all trucking expenses are charged to general overhead, that it makes no direct charges for hauling. However, the record makes it plain that respondent recovers at least a part of the cost of transportation of its products by means of price differentials.

Section 2, Chap. 166 (Rem. Rev. Stats. § 6382–2), defines a "private carrier" as follows:

"Section 2 (g) A 'private carrier' is a person who, in his own vehicle, transports only property owned or being bought or sold by him in good faith and only when such transportation is purely an incidental adjunct to some other established private business owned or operated by him in good faith."

Since respondent receives some compensation for the hauling which it

does, it cannot be classed as a private carrier.

The act defines a common carrier as:

"Section 2 (e) The term 'common carrier' means any person who undertakes to transport property for the general public by motor vehicle for compensation, whether over regular or irregular routes, or regular or irregular schedules, including motor vehicle operations of other carriers by rail or water and of express or forwarding companies."

It is apparent that respondent is not a common carrier and cannot be so classified. It does not undertake to transport property for the general public.

Neither is respondent an "exempt carrier" as defined in the law. A "contract carrier" is defined as follows:

"Section 2 (f) The term 'contract carrier' shall include all motor vehicle operators not included under the terms 'common carrier' and 'private carrier' as herein defined in paragraph (e) and paragraph (g), and further shall include any person who under special and individual contracts or agreements transports property by motor vehicle for compensation."

[1] Since respondent is neither a private carrier, nor a common carrier, nor an exempt carrier, it must necessarily fall within the classification of a contract carrier as described in the first part of the definition quoted above. It will be noted that this type of contract carrier does not cover the kind of operation usually associated with that term. It does not operate "under special and individual contracts or agreements" with shippers. For convenience in regulation and reference it would appear advisable to set up a special subclassification within the contract carrier group to be known as "limited contract carrier," into which subclassification respondent and similar operators should be grouped. As a limited contract carrier respondent must apply to and receive from the Department proper permits and plates and file with the Department proper insurance policies covering its equipment. Respondent must also comply with the safety rules and laws applicable to contract carriers generally. It must also file with the Department from time to time, as required by law and the rules of the Department, such reports as shall be requested and must pay the regulatory fees required of contract carriers.

[2] The next question which presents itself is: Shall respondent's price differentials be fixed at not less than the rate, fare, or charge provided for other contract carriers and common carriers? Section 2 (a) of the Law (§ 3, Chap. 166, Laws of 1937 [Rem. Rev. Stats. § 6382–2a]) reads as follows:

"Operators of motor vehicles excluded from the term 'private carrier,' other than 'common carriers' shall not be compelled to dedicate their property to the business of public transportation and subject themselves to all the duties and burdens imposed by the act upon 'common carriers,' but where they recover the cost of transportation through price differentials or in any other direct or indirect manner and such transportation cost recovery unreasonably endangers the stability of rates and the essential transportation service involving the

movement of commodities over the same route or routes by other types of carriage, then such transportation costs, attempted to be recovered, shall not be less than the rate, fare, or charge regularly established by the Department for such transportation service if given by other types of carriers, it being the intention of the legislature to foster a stable rate structure free of discriminations for the shippers of the state of Washington."

We have already seen that respondent's operations are not of the usual contract carrier type. In the nature of its business it cannot and does not recover the total cost of transportation by means of price differentials. In many instances the differentials are affected by competition with out-of-state mills. In large areas of the state respondent could not compete with these foreign mills if it were required to increase the price differentials. Certainly such a result would not be in the public interest nor would it be beneficial to common carriers and other contract carriers. It is quite clear from the record herein that respondent's operation does not unreasonably endanger the stability of rates of other carriers and the essential transportation service involving the movement of commodities by other types of carriers. We find, therefore, that respondent should not be required to charge common carrier rates.

Based upon the foregoing findings and opinion, there should be entered the following

ORDER

Wherefore it is *ordered*

1. That a special group or subdivision be set up within the contract carrier classification to be known as "limited contract carriers" and defined as set forth in the above findings of fact and opinion.

2. That the Centennial Flouring Mills Company be and is hereby classified as a contract carrier within the subdivision herein established under the designation of limited contract carrier and as such is hereby required to comply with the applicable laws and rules and regulations of the Department.

3. That this order shall become effective thirty days from this date.

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*WISCONSIN PUBLIC SERVICE COMMISSION*

# John G. Jefferds et al.

*v.*

# Farmers Union Telephone Company et al.

[2-U-1335.]

*Rates, § 582 — Telephones — Intercity tolls.*

1. A toll rate in one direction should not be different from the rate for

calls in the reverse direction over the same wires unless some condition exists to justify such difference, p. 53.

*Rates, § 582 — Telephones — Uniformity of tolls.*

2. Toll rates should be uniform for all routes of similar distances and traffic, p. 53.

*Rates, § 584 — Telephones — Toll — Flat charge.*

3. A flat monthly charge for unlimited telephone toll service between two cities is objectionable since, if the flat rate is optional, the large toll users receive substantial benefits while the great bulk of the subscribers secure no advantage at all, and there are also administrative objections to optional flat rate toll service, p. 54.

*Return, § 111 — Telephone company.*

4. A return of 7.6 per cent to a telephone company was considered sufficient, p. 55.

[February 21, 1939.]

INVESTIGATION *of intercity joint telephone toll rates; temporary toll rate schedule authorized.*

By the COMMISSION: On August 15, 1938, John G. Jefferds and fifty-three other persons filed a petition with this Commission complaining that the rates charged for toll service between Middleton and Madison by the Farmers Union Telephone Company and Wisconsin Telephone Company are unreasonable. Public hearing was held at Madison, September 21, 1938, examiner C. V. Olson presiding. The appearances were:

John G. Jefferds, Middleton, and Max Stadler, Middleton, for the petitioners; J. F. Krizek, Attorney, Milwaukee, and L. J. Fitzgerald, Commercial Engineer, Milwaukee, for the Wisconsin Telephone Company; C. A. Connor, Middleton, and R. P. Ripp, Secretary and Treasurer, Cross Plains, for the Farmers Union Telephone Company; B. J. Sickler, of the Commission staff.

This matter has been held in abeyance pending negotiations between the interested parties and the Commission's staff to determine if some mutually satisfactory solution could be worked out that would result in a lower toll rate between Middleton and Madison. Although negotiations have not been entirely successful, useful information has been obtained. The complainants' petition in this case requests that the present 10-cent toll charge between Middleton and Madison (initial period, station-to-station service) be reduced to 5 cents, or that a flat monthly rate be established for unlimited service. At the hearing there was some discussion of a flat rate of $2 a month in addition to the regular monthly charge of $1.75, but it appears that only a limited number of subscribers would be interested in such flat rate.

[1, 2] With regard to a reduction in the charge per message, we feel that there are two considerations that should be borne in mind: (1) That the toll rate from Middleton to Madison should not be different from the

rate for calls in reverse direction over the same wires (i. e., from Madison to Middleton) unless some condition exists to justify such difference, and (2) that the Wisconsin Telephone Company's rates for Madison-Middleton calls should not be different from toll rates of that company for other routes of similar distances and traffic in the state. The Wisconsin Telephone Company's toll rate structure has been designed, for the most part, on the basis of uniform rates for all routes of similar distances and we feel that this principle should not be disturbed.

The Wisconsin Telephone Company's toll department in 1937 reported net revenues of 3.8 per cent of the book value of plant less depreciation reserve. From this showing, it does not appear that any general reduction in toll revenues can be ordered without substantial adjustments in property or expenses. The company claims that the cost of rendering short-haul toll service is such that a rate of less than 10 cents is not compensatory. No breakdown of these costs was introduced in this matter other than a statement that traffic operating costs on Madison-Middleton traffic amount to 3½ cents per call, leaving a relatively small margin to cover other costs. The Farmers Union Telephone Company has submitted a traffic count and analysis of traffic labor made for it by the Wisconsin Telephone Company which shows that 28.9 per cent of the operators' time was occupied with calls to Madison. The annual operators' payroll was stated at $3,180, of which 28.9 per cent is $919. Calls to Madison in 1937 totaled 21,731. Figures for traffic operating labor give an average of 4.23 cents per call or more than half the Farmers Company's share of the toll message revenue. One important item included in expense of making toll calls is the cost of ticketing and billing individual calls. In this case, it is possible that up to one-half of the traffic operating labor cost is attributable to the ticketing operation, and the billing expense is an additional item.

If some way could be found to reduce these costs, a reduction could be made in the toll charge. There appears to be a possibility of such reduction in costs by the use of a message register or a tally system for recording calls in place of the conventional method of ticketing. Billing costs also could be reduced by charging for all calls in a single billing. However, according to the data furnished by the Wisconsin Telephone Company, the cost of installing message registers in a large exchange would be such as to make their use impracticable. In the smaller exchanges, on the other hand, the use of a tally system appears to us to be practical and would involve no additional equipment. We believe that a system of this character should be tried out experimentally in this case with a study of the system by the Commission's staff during operation to determine its practicability and desirability.

[3] With regard to the suggested arrangement of a flat monthly charge for unlimited toll service from Middleton to Madison, it appears that there are several objections to such arrangement. If the flat rate were to be made optional, the large toll users would receive substantial benefits while the great bulk of the subscrib-

ers would secure no advantage at all. In the Middleton situation, it appears that a maximum of 10 per cent of the total users would take advantage of a flat monthly rate of $2. These few subscribers would receive reductions ranging up to 68 per cent of their present bills, while 90 per cent of the users would receive no reduction. Although relatively few Middleton subscribers make heavy use of Madison toll service, the traffic study shows a greater community interest of Middleton with Madison than the more diffused interest of Madison subscribers in calling Middleton.

There are also administrative objections to an optional flat-rate toll service. The practice of using the telephones of unlimited service subscribers by other users to make Middleton-Madison calls would be difficult for the telephone company to prevent, and would create a nuisance for the flat-rate subscribers to contend with.

Consideration has been given to a possibility of an extra charge of 25 cents monthly to cover the Middleton-Madison toll service to be paid by all Middleton subscribers, but to be effective only if the majority of the users voted for the service. The Wisconsin Telephone Company expressed willingness to permit unlimited service for such charge, but insists that the full amount of the charge shall be paid to it with no portion retained by the Farmers Company. Under this arrangement the revenue received from these calls by the Wisconsin Telephone Company would be substantially that received in 1937, but the revenues of the Farmers Company would be reduced about $1,700. Considering that this company's total reported operating income in 1937 was $2,197, it appears that such reduction would be larger than the Farmers Company fairly could be asked to bear.

We are of the opinion that the Farmers Union Telephone Company should establish for an experimental period of six months a toll rate of $8\frac{1}{3}$ cents, or 3 calls for 25 cents, on station-to-station calls from Middleton to Madison for each five minutes or fraction thereof, covering "sent paid" calls only, such rate to be made available to all single party subscribers other than pay stations, who will sign an application agreeing to a minimum monthly charge of 25 cents for this service and authorizing the company to register each 5-minute period or fraction thereof by tally on a record card and bill the customer a single amount monthly for all such calls at the rate of $8\frac{1}{3}$ cents per unit tallied, subject to the minimum. This optional, experimental rate will not be made available for pay stations since it is not practicable to charge $8\frac{1}{3}$ cents for pay station calls. For the period of this experimental rate, observations and studies will be made by the Commission's staff to determine the extent of the savings in calls under the tally system of recorded calls.

**[4]** If it is assumed that all subsubscribers who averaged three calls or more per month, excluding pay stations, would take advantage of the experimental rate, this means that the rate would apply to 56.4 per cent of the total calls. If a reduction of $1\frac{2}{3}$ cents per call is applied to this proportion of the 19,153 10-cent and 15-cent calls in 1937, the $8\frac{1}{3}$-cent rate would result in a lower gross revenue of $163

annually. This calculation assumes that there will be no increase in the number of calls. It appears that this loss in revenue should be borne by the Farmers Union Telephone Company rather than by the Wisconsin Telephone Company and rather than by each company partially, since the first-named company will receive any benefits of reduced cost arising from the proposed system of recording calls. In this connection, it may also be noted that the annual report of the Farmers Union Telephone Company to the Commission covering the year 1937 shows net revenues available for return of $2,197. If no savings in cost result under the arrangements proposed, this net revenue will be reduced by $163 to $2,034. The company's property and plant account, less the depreciation reserve of December 31, 1937, as shown by its annual report, was $26,660. Adding an allowance of $1,400 for working capital, this figure becomes $28,100. The income of $2,034 noted above is 7.6 per cent of $28,100, so that it appears that the company's return will not be reduced to an unreasonable level under the proposed arrangement.

As we have hereinbefore stated, the Wisconsin Telephone Company's toll department in 1937 reported a net operating income of only 3.8 per cent of the plant value less depreciation reserve. Toll revenues in 1938 are less than in 1937. We feel, therefore, that the entire revenue reduction in this case should be borne by the Farmers Union Telephone Company, and that the toll revenues turned over to the Wisconsin Telephone Company, should be computed by figuring all 8⅓-cent calls as if they were 10-cent calls.

With respect to the number of telephone operators required by the Farmers Union Telephone Company, it appears that the present staff of four operators from 7 A. M. to 10 P. M. could handle any increases in calls that might result under the proposed rate. By working each operator six hours a day (forty-two hours weekly) two operators could be on duty at all times between 10 A. M. and 8 P. M., excepting between 1 and 2 P. M. The estimate of Mr. Connor, manager of the Farmers Union Telephone Company, that two more operators would be required to handle the traffic if the rate were reduced to 5 cents appears to be exaggerated, and in any event does not apply to the situation under the rate proposed herein. Mr. Connor stated that under the 5-cent rate two operators would be required during the entire day. It appears to be unquestionable that two operators on duty during all hours of the day except the slackest periods could handle the calls under an 8⅓-cent rate.

*Findings of Fact*

The Commission finds that an optional, experimental toll rate for the Farmers Union Telephone Company at its Middleton exchange for a period of six months of 8⅓ cents on station-to-station calls from Middleton to Madison for each five minutes or fraction thereof, covering "sent paid" calls only, available to all single party subscribers other than pay stations who will sign an application agreeing to a minimum monthly charge of 25 cents for this service and who will authorize the company to register each 5-minute period or fraction thereof by tally on a record card, and to make a

monthly billing for all such calls in a single amount, is just and reasonable.

The Commission further finds, that the loss in revenue caused by the reduction of this toll rate, should be borne by the Farmers Union Telephone Company, and that the Wisconsin Telephone Company's share of the toll revenues received from the Farmers Union Telephone Company for this service shall be computed on a basis of 10 cents for each call rather than 8⅓ cents.

ORDER

It is therefore *ordered,* that the Farmers Union Telephone Company be and is hereby authorized and directed to file and charge the following optional toll rate effective for a period of six months after the first billing date following the date of this order:

An experimental toll rate of 8⅓ cents on station-to-station calls from Middleton to Madison for each five minutes or fraction thereof, covering "sent paid" calls only, available to all single party subscribers other than pay stations who will sign an application agreeing to a minimum monthly charge of 25 cents for this service and who will authorize the company to register each 5-minute period or fraction thereof by tally on a record card, and to make a monthly billing for all such calls in a single amount at the rate of 8⅓ cents per units tallied, subject to the minimum.

It is *further ordered,* that the Farmers Union Telephone Company shall report to the Commission each month the number of calls from Middleton to Madison coming under the experimental rate as above prescribed, and the number of all Middleton-Madison calls of other classes.

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*NEW JERSEY SUPREME COURT*

# New Jersey Suburban Water Company

*v.*

# Board of Public Utility Commissioners et al.

[No. 207.]

(— N. J. L. —, 4 A. (2d) 47.)

*Rates, § 186 — Petition for increase — Burden of proof.*

1. A public utility which petitions the Commission for authority to increase its rates has the burden of establishing its case, p. 58.

*Rates, § 32 — Duty of Commission.*

2. The Commission, in a rate proceeding, must weigh the evidence, ascertain the facts, and upon the same fix a rate which would bring a fair and just return to the utility for the service rendered, p. 58.

*Appeal and review, § 32 — Conclusiveness of Commission's findings.*

3. The Commission's findings are conclusive when there is ample evidence

to support them, and the court cannot substitute its judgment in lieu thereof, p. 58.

*Valuation, § 193 — Property used and useful.*

4. The Commission, in fixing a rate base, need only find the present value of that property used and useful for public purposes, having regard to the value of the service rendered, p. 59.

*Rates, § 134 — Comparability of rates — Discretion of Commission.*

5. Comparability of rates charged by like utilities in adjacent communities is within the sound discretion of the Commission in a proceeding to establish rates to be charged by a public service corporation, p. 59.

[February 6, 1939.]

PETITION *for writ of certiorari to review action of the Commission in fixing water rates; writ dismissed and order of the Commission sustained.*

Argued October term, 1938, before Case, Donges, and Porter, JJ.

APPEARANCES: McCarter & English, of Newark (George W. C. McCarter, of Newark, of counsel), for prosecutor; John A. Bernhard, of Newark (Frank H. Sommer, of Newark, of counsel), for respondent Board of Public Utility Commissioners; Michael J. Bruder, of Newark (Anthony P. Kearns, of Newark, of counsel), for respondent town of Harrison.

PORTER, J.: The action of the Board of Public Utility Commissioners, respondents, in the fixing of rate for water sold by New Jersey Suburban Water Co., prosecutor, is before us on a writ of certiorari for review.

The order of the Board in question was made under date of October 4, 1937, and fixed a rate of $99 per million gallons as the just and reasonable rate to be charged by the prosecutor.

It is the contention of the prosecutor that this order should be set aside because the conclusions of the Board were improperly arrived at, in that the valuation of the prosecutor's property as a rate base was contrary to the facts; as was also the amount of depreciation, its value as a going concern, and its operating expenses, so that a fair return on its investment is not provided in the rate fixed.

It is also the contention that the said rate amounts to confiscation and deprives the prosecutor of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, USCA.

[1, 2] The petition of the water company to the Board for an increase in the rate raised issues of fact as to the right of the petitioner for the relief prayed for. It had the burden of establishing its case. The evidence was conflicting. Much of it was given by experts. The Board is a fact-finding body and its function was to weigh the evidence, ascertain the facts, and upon the same to fix a rate which would bring a fair and just return to the utility for the service rendered.

[3] A careful examination of the testimony satisfies us that the Board was justified in its conclusions. No useful purpose is to be served in re-

viewing the testimony. Suffice it to say, that in our opinion there was ample testimony to support its findings as a reasonable conclusion and, therefore, this court cannot substitute its judgment for that of the Board. Cf. West Jersey & Seashore R. Co. v. Public Utility Comrs. 8 N. J. Mis. R. 212, P.U.R.1930D, 206, 149 Atl. 269; Fornarotto v. Public Utility Comrs. (1928) 105 N. J. L. 28, P.U.R. 1929A, 360, 143 Atl. 450.

[4] In considering what was a fair return for the petitioner it developed that its business had been greatly curtailed in recent years and that it was serving but two customers, the town of Harrison and the East Newark Realty Co., a relatively small user, and that its facilities were much in excess of its present requirements. In fixing the base values for rate-making purpose the Board was justified in finding the present value of only that portion of the property which was used and useful, having regard to the value of the service rendered. Cf. Ben Avon v. Ohio Valley Water Co. 260 Pa. 289, P.U.R.1918D, 49, 103 Atl. 744; San Diego Land & Town Co. v. Jasper (1903) 189 U. S. 439, 47 L. ed. 892, 23 S. Ct. 571; Long Branch Commission v. Tintern Manor Water Co. (1905) 70 N. J. Eq. 71, 62 Atl. 474; Spring Valley Water Co. v. San Francisco (1904) 165 Fed. 657.

[5] It appears that the Board took into consideration comparative rates allowed for the sale of water in adjacent communities as an "indicia of what may be termed reasonable value of the services and on the average the Board finds no rate existing in excess of $99 per million gallons." The prosecutor contends that the Board considered cases not comparable and excluded testimony offered of really comparable situations. The comparability of other rates and the weight such testimony is to have is within the sound discretion of the Board. Cf. Public Service Gas Co. v. Public Utility Comrs. (1913) 84 N. J. L. 463, 87 Atl. 651; Pennsylvania Power & Light Co. v. Public Service Commission (1937) 128 Pa. Super. Ct. 195, 19 P.U.R.(N.S.) 433, 193 Atl. 427.

Having concluded that the testimony justified the Board in fixing the rate complained of, it follows that there is no merit in the allegation of confiscation of property without due process of law.

The decision or order of the Board is sustained and the writ is dismissed, with costs.

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*MICHIGAN PUBLIC UTILITIES COMMISSION*

# Re Lake City Telephone Company

[T–405–39.1.]

*Return, § 52 — Confiscation — Denial of return.*

1. A public utility is entitled to earn a reasonable or fair return and the fixing of rates by a court or Commission that result in profits of less than

a reasonable return constitutes confiscation, which is unconstitutional, p. 61.

*Return, § 24 — Reasonableness — Maintenance of credit — Attraction of capital.*

2. The return of a public utility should be sufficient to assure confidence in the financial soundness of the utility and to maintain its credit and attract required capital, p. 61.

*Service, § 294 — Ownership of instruments — Dial type telephone service.*

3. The Commission will deny the right of roadway telephone associations to own, maintain, and install the telephone instruments connected to lines connected to dial type central office equipment, since in view of the complicated operation and the consequent added necessary maintenance of dial type service it is essential that the instruments be owned, installed, and maintained by the telephone company to insure adequate and satisfactory service to all its subscribers, p. 62.

[February 14, 1939.]

COMPLAINTS *concerning "service station" telephone rates; revised tariff sheets authorized to be submitted.*

By the COMMISSION: In this matter, after petitions were filed and complaints made in relation to the "service station" telephone rates of the Lake City Telephone Company, a hearing was held by the Commission in the Missaukee county courthouse in Lake City, Michigan, on Wednesday, February 1, 1939, and a continued hearing was held in the Commission's offices in Lansing on February 9, 1939. At these hearings considerable testimony was offered by the presidents and secretaries of the roadway telephone associations who secure switchboard service from the Lake City Telephone Company. This testimony was to the effect that, in their opinion, the rates authorized by this Commission for service station subscribers of the Lake City Telephone Company were unjust and unreasonable and would result in the discontinuance of service by many subscribers.

Evidence and testimony in the behalf of the Lake City Telephone Company was also introduced by telephone consultant, W. T. King, which testimony dealt exhaustively with the present and future investment of the Lake City Telephone Company in telephone plant and materials; the present and probable future expenses of the Lake City Telephone Company; and the present and probable future revenue of the Lake City Telephone Company.

Service station telephone companies usually own and maintain their telephone lines and instruments, switchboard service only being furnished by the exchange to which they are connected. For a number of years the service station rates of the Lake City Telephone Company have been 50 cents per service station per month with a minimum charge of $3 per line per month. On the 30th day of August, 1938, after a public hearing called July 28, 1938, the Lake City Telephone Company was authorized by this Commission to institute certain rate increases found reasonably necessary for the rendering of adequate telephone service to the public.

Among these increases the telephone company was authorized to charge 75 cents per month to residence subscribers for switching service and $1.25 per month to business subscribers for switching service, and an additional 25 cents per month for the rental of a dial-type telephone instrument to service station subscribers.

It appears from the records and files of the Commission and from the testimony had at the hearings that the Lake City Telephone Company has approximately eighty-eight service station subscribers each of whom owns his own instrument and a share of the line to the base rate area boundary line of the Lake City exchange; each customer is responsible for the maintenance of his instrument and a portionate share of the maintenance expense of the association's line.

The exchange rental annually derived from the service stations connected to the Lake City exchange at the rates fixed by this Commission, as above recited, would be approximately $1,008 per year. The exchange revenue from the other classes of service rendered by the Lake City Telephone Company would amount to approximately $4,275 per year, or the total annual revenue from exchange services would be approximately $5,275. The toll and miscellaneous revenue that would probably be realized by the company from its operations will aggregate approximately $1,315 annually, making a grand total of all revenue of approximately $6,590. The estimated future annual operating expenses are $5,814 and would result in a balance available for return on the owners' investment of $781 or only 3.16 per cent of the net value of the investment.

[1, 2] That a public utility is entitled to earn a reasonable or "fair" return has been universally recognized by both courts and Commissions; the fixing of rates by a court or Commission that result in profits of less than a reasonable return are termed "confiscation" or the taking of property without compensation, which is forbidden under the Constitution. The return should be sufficient to assure confidence in the financial soundness of the utility and to maintain its credit and attract required capital.

Examination of summaries of 358 recent court and Commission decisions throughout the United States discloses that no rate of return determination of less than 4.43 per cent has been made since 1924. The average rate of return in all these decisions was 5.93 per cent, the maximum being 9 per cent. There is but little doubt that the Lake City Telephone Company could successfully prosecute its claim for higher rates than were petitioned for and granted by this Commission on August 30, 1938.

It is, therefore, self-evident that if any particular class of subscribers are furnished service at a rate lower than that prescribed by this Commission in the recent order, this Commission would normally be bound to increase the rates to other classes of service sufficiently to equal the loss in revenue. It appears, however, that the charging and collecting of the proposed service station rates of $1 per month in the case of residence subscribers and $1.50 per month in the case of business subscribers (the charge in each case includes 25 cents per month for

the rental of a dial type instrument) will be the cause of animosity between the Lake City Telephone Company and the users of its switching service as is evidenced by the complaints made to the Commission. It further appears that the controversy between the company and its patrons, if allowed to continue, will deprive many residents of the community of a large part of the telephone service necessary for the normal conduct of their business and social activities and will also deprive the company of a large portion of the revenue necessary for its well being and continued existence. In view of this, the Lake City Telephone Company has agreed to a compromise acceptable to the service station subscribers, which compromise will be adopted and ordered by this Commission.

Much of the testimony offered by the complainants in this cause was to the effect that if the service station rates were reduced by this Commission that a large number of additional subscribers could be secured which would result in the securing by the Lake City Telephone Company of even more revenue than that contemplated by the rate schedule heretofore approved, which additional revenue was estimated to be approximately 25 per cent. In view of this, the Commission has determined to reduce the service station rates of the Lake City Telephone Company to the extent of 10 cents per month in the case of all such subscribers, which reduction will result in a service station rate of 65 cents per month in the case of residence subscribers and $1.15 in the case of business subscribers with an additional 25 cents per month for the rental of a dial type instrument.

[3] In view of the complicated operation and the consequent added necessary maintenance of dial type service it is essential that the instruments be owned, installed, and maintained by the Lake City Telephone Company to insure adequate and satisfactory service to all its subscribers. The Commission will, therefore, continue to deny the right of the roadway associations to own, maintain, and install the telephone instruments connected to the lines connected to the dial-type central office equipment of the Lake City Telephone Company.

The rates herein fixed are promotional in nature and are temporary; their continued effectiveness being conditioned upon the securing of additional customers as promised by various witnesses appearing before the Commission. If, after an experimental period, embracing the months of February, March, April, May, and June of 1939, and terminating on June 30, 1939, the revenue derived by the Lake City Telephone Company from service station lines has not been increased 25 per cent from exchange services, the rates herein fixed will be automatically superseded by the rates fixed in the order of August 30, 1938, upon the filing by the Lake City Telephone Company of revised rate sheets applying to its tariff schedule, together with affidavits to the effect that the anticipated increased revenue has not been realized, together with statements of the amount of revenue as actually realized, shown in a manner similar to that used on Exhibit 7A introduced at the February 9, 1939, hearing in this cause.

*NEW YORK SUPREME COURT, WESTCHESTER COUNTY*

# David Broderick

*v.*

# Westchester Lighting Company

(— Misc. —, — N. Y. Supp. (2d) —.)

*Rates, § 215 — Contracts — Effect of regulatory law.*

1. A rate agreement between a public utility company and a customer is subject to the provisions of the Public Service Law, p. 63.

*Rates, § 212 — Contracts — Invalidity.*

2. An agreement between a public utility company and a customer, if it provides for a different rate than that specified in the schedules of the utility filed and in effect at the time, is void, p. 63.

*Rates, § 640 — Proper remedy — Complaint to Commission.*

3. The proper remedy of a customer who claims that rates charged are unreasonable or unfair, by virtue of an alleged contract, is by complaint to the Commission, p. 64.

*Mandamus, § 9 — Improper remedy — Service obligation — Attack on rate contract — Fraud.*

4. A customer claiming that he was induced to enter into a service contract by false or fraudulent representations, to his damage, has an adequate remedy at law by appropriate action, and his petition for an order directing a utility company to supply service at rates set forth in the petition, allegedly established by contract, should be dismissed, p. 64.

[March 11, 1939.]

PETITION *for order directing a public utility company to supply gas and electricity to petitioner's residence at rates set forth in petition and allegedly established by contract; petition dismissed.*

NOLAN, J.:

[1, 2] The petitioner applies for an order directing defendant to supply gas and electricity to petitioner's residence at the rates set forth in the petition, and alleges that on or about August 6, 1935, petitioner and defendant entered into and "duly signed and executed" a "writing," and sets forth a letter from defendant referring to a reduction of defendant's rates and suggesting that if petitioner desired to enjoy the full benefit of the new rates, a power meter then used by petitioner should be removed, and that all electricity should be furnished through one meter. Petitioner states that a schedule of rates was furnished and that he "complied with said writing," and that defendant furnished

electric service at the rates set forth in the schedule until May, 1938, when the rates were raised and that thereafter, petitioner was billed for service at the increased rates. Apparently, petitioner seeks to plead a contract. If the "writing" referred to, and the "compliance with the writing" pleaded constitute a contract, no agreement was made to furnish service at the rates provided, for any specified period, and if such agreement had been made, it was subject to the provisions of the Public Service Law. Such agreement if it provided for a different rate than that specified in the schedules of the defendant filed and in effect at the time, was void (Public Service Law, § 66, subd. 12). Petitioner does not allege that he is entitled to the rates set forth in the petition, according to the schedules on file, or that the rates at present charged are violative of the schedules now in effect, or are discriminatory in so far as he is concerned.

The defendant by its answer alleges that it filed and kept on file with the Public Service Commission, and duly printed, posted, and kept open for inspection, certain schedules setting forth certain classifications of service and the rates applicable thereto, and that up to the time complained of by petitioner, it furnished gas service under its Service Classification No. 1, and electric service under its Service Classification No. 1, and that thereafter, on discovery that the premises had been altered and had become a multiple dwelling, and that such service was not available to petitioner under such classifications, furnished service under the proper classifications and the rates applicable thereto, and billed him accordingly. While practically every allegation of the answer is denied by petitioner's reply and certain allegations of new matter are contained therein, no issue is thereby created which necessitates a trial, since petitioner does not create an issue of fact, which if determined in his favor, would entitle him to the relief applied for.

**[3, 4]** If every allegation of the petition and reply be accepted as true, and every allegation of the answer be considered as not established, petitioner has still failed to establish that he is entitled to service at the rates which he sets forth in his petition, or that the defendant has failed in a duty imposed upon it by law. If petitioner's claim is that the rates charged are unreasonable or unfair by virtue of the alleged contract referred to, his proper remedy is by complaint to the Public Service Commission. If petitioner claims that he was induced to enter into the contract by false or fraudulent representations, to his damage, he has an adequate remedy at law by appropriate action. Since no triable issue is presented, the petition is dismissed. Settle order on notice.

# Industrial Progress

*Selected information about manufacturers, new products, and new methods. Also news on personnel changes, recent and coming events.*

## Chicago Utility Program Totals $2,500,000

THE Commonwealth Edison Co. has ordered $2,500,000 of equipment for use in expansion of its plants, according to a recent announcement.

The new equipment will include the installation of a 50,000 kilowatt high pressure topping unit at Commonwealth's Northwest station.

## Scarratt Succeeds Johnston at International Harvester

THE retirement of Edward A. Johnston, vice president of the International Harvester Company, Inc., in charge of engineering and patents, has been annouced by President S. G. McAllister. He is succeeded by A. W. Scarratt, formerly chief of automotive engineering and assistant to Mr. Johnston.

Associated with the Harvester company since 1905, Mr. Johnston designed and built the company's first auto-buggy, predecessor of its line of modern motor trucks and three years later he built the company's first farm tractor. He was appointed director of engineering in 1922 and was elected vice president in 1934.

Mr. Scarratt has been assistant to Mr. Johnston since 1936. Starting as engineer with the Twin City Rapid Transit Company of St. Paul, Minn., Mr. Scarratt also was associated with the Minneapolis Steel and Machinery Co., and later was chief engineer of the Hyatt Roller Bearing Company. In 1927, he was engaged as chief engineer of motor trucks and coaches by the Harvester company and became chief of automotive engineering in 1935.

## Symposium on Water Metering

WATER works and city officials, taxpayers and others concerned with reducing waste and expense, will be keenly interested in a 32-page brochure on this subject published by the Neptune Meter Company.

Compiled in this attractively illustrated booklet are a number of articles written by authorities in the water works and municipal field throughout the country. The authors discuss from their own practical experiences, various phases of economies that can be accomplished by the use of water meters.

Herein will be found the answers, based on practical operating experiences, to such questions as: What will the 100 per cent use of water meters accomplish for a city? In how many ways will meters save money, and reduce the waste of water, unnecessary pumping, and other obstacles to efficient operation?

Copies of this publication, entitled "More Water Glideth by the Mill than Wots the Miller of" may be obtained from the Neptune Meter Company, 50 West 50th Street, Rockefeller Center, New York, N. Y.

## New Electrolysis Instrument

CONTROL of stray currents from electric railways and the design and regulation of cathodic circuits for protecting pipe lines and other buried structures will be simplified as a result of an improvement in one of the important measuring instruments used in this connection, according to the National Bureau of Standards.

The improved instrument was developed as a result of a study by Scott Ewing, research associate of the American Gas Association at the Bureau.

Mr. Ewing has constructed a cadmium-cadmium sulphate half-cell for measuring potentials in the earth that is very much better for this work than the copper-copper sulphate half-cell previously used. Cadmium is considerably more stable in potential behavior than copper, and cadmium electrodes when plated with spongy cadmium, are reproducible within twenty-five hundred thousandths of a volt. The error from polarization of the cell can be reduced to one thousandth of a volt at most, under the usual conditions of current flow.

A half-cell, using the new elements, has been designed by Mr. Ewing for field use. Its arrangement and form are the same as in the familiar copper-copper sulphate cells. Steps have been taken to secure patents on these improvements which, if granted, will be dedicated to the public, according to the National Bureau of Standards.

## IBM Day at the Fair

THE celebration at the New York World's Fair of IBM Day was held May 4th. The day was dedicated to the International Business Machines Corp., for its contributions to the cause of international understanding and to its president, Thomas J. Watson for his achievements in the field of world peace. Following a brief ceremony at the Perylon Hall, Grover Whalen, introduced by Frederick W. Nichol, vice president and general manager of IBM, dedicated the day to Mr. Watson in a speech at the IBM exhibit in the Business Systems and Insurance Building.

The first letter to be transmitted from coast to coast without a relay, by radiotype, was received at the IBM exhibit from the Press Wireless station in San Francisco. The letter, which was a message of greeting from IBM's San Francisco organization, referred to this use of the radiotype as the postal system of the World of Tomorrow.

A peace program in the Hall of Music, which concluded the IBM celebration, was addressed by Mr. Watson who also is president of the International Chamber of Commerce and a trustee of the Carnegie Endowment for International Peace.

## Heating and Ventilating Exposition Announced

THE Sixth International Heating and Ventilating Exposition will be held at Cleveland, Ohio, January 22 to 26, 1940. As usual, the Exposition will be under the auspices of the American Society of Heating and Ventilating Engineers and will coincide with the 46th Annual Meeting of the Society, according to a recent announcement.

During the same week, also in Cleveland, will be held the meetings of the National Warm Air Heating and Air Conditioning Association, together with other meetings which have not yet been definitely announced.

Lakeside Hall, where the Exposition will be held, is connected with the Cleveland Public Auditorium, and offers every modern facility for this Exposition. Announcement of the Exposition to previous exhibitors has resulted in an enthusiastic response, according to the management. More than half of the available exhibit space in Lakeside Hall has already been engaged by 184 exhibitors. Previous expositions have been held in Philadelphia in 1930, in Cleveland in 1932, in New York in 1934, in Chicago in 1936, and in New York in 1938.

Management of the Exposition and all details of exhibit arrangement and leasing will be in charge of the International Exposition Company, Grand Central Palace, New York. The Exposition will be under the personal direction of Mr. Charles F. Roth, manager, who was similarly responsible for each of the earlier expositions.

## Fluorescent and Wide-Beam Floodlights by G-E

FOR outdoor color illumination of buildings, signs, and posters—2,500 of the units are already in operation at the Golden Gate International Exposition, San Francisco—a fluorescent floodlight has been announced by the General Electric Company. Comparative efficiency of the new floodlights depend upon the color of light produced, but, for example, it takes only 15 watts for the fluorescent unit to produce as much green light as is possible with a 375-watt incandescent fluorescent floodlight.

Equipped with an 18-inch tubular fluorescent lamp, the new product has an aluminum trough-type reflector which also serves as a housing. The interior is Alzak-processed for high reflectivity. Mounted on a metal standard with bolts for adjustment of the light, the unit provides for easy replacement of the lamp by a hinged, rubber-gasketed door with clear glass. A six-foot conductor cord is supplied with each floodlight.

To meet floodlighting requirements of certain athletic fields, filling stations and parking lots, an inexpensive, widebeam, open Alzak-finish aluminum floodlight, to be known as the Type L-60, has been developed also by the General Electric Co. The floodlight is designed for use with 750/1000/1500-watt lamps and has a beam angle of 100 degrees. The wide beam angle and high reflectivity of this floodlight make it particularly suited for lighting large areas near the floodlight. For the floodlighting of baseball fields and other areas farther from the floodlight, narrow-beam floodlights should supplement this wide-beam unit.

## Automatic and Self-Regulating Battery Charger

A COMPLETELY automatic and self-regulating electronic battery charger called the Phano-Charger has been developed by the General Electric Co. for charging and maintaining storage batteries used in substations, and other places for standby service, control power, and emergency lighting.

By using industrial-type metal phanotron rectifier tubes, moving parts are eliminated thus assuring long life for the equipment and practically silent operation.

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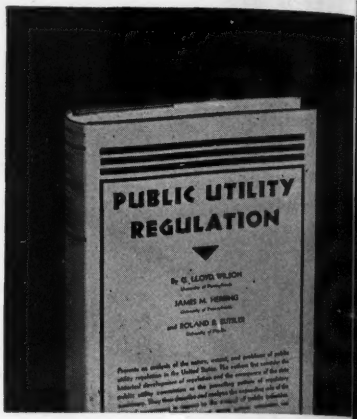


# Public Utility Regulation

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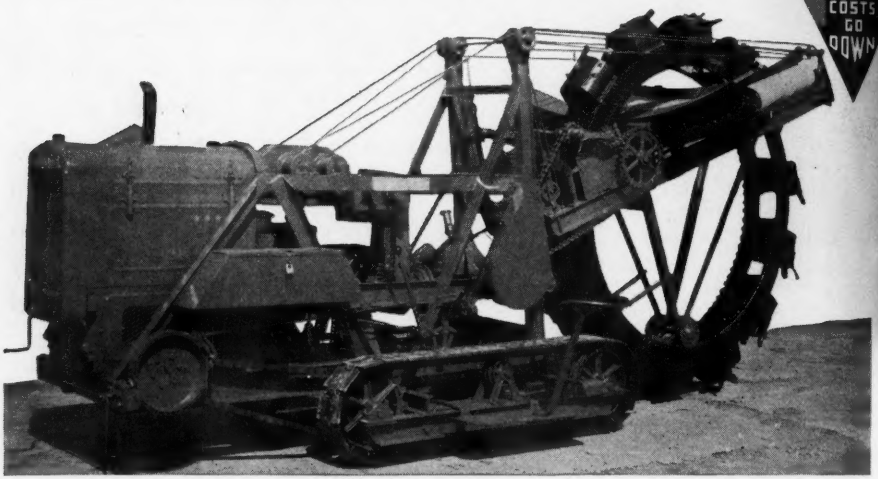

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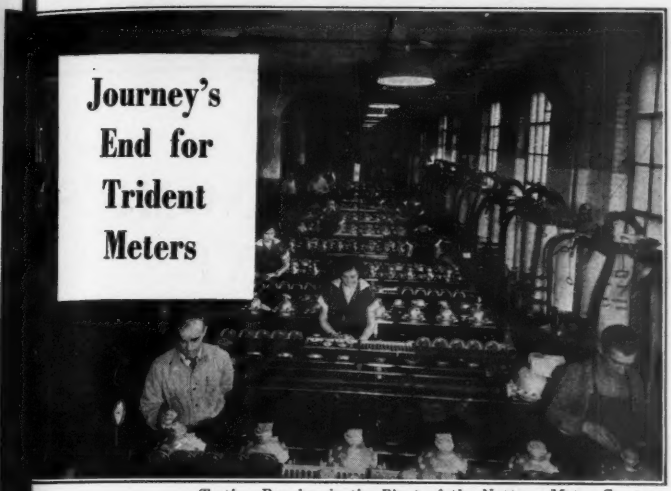


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## PROFESSIONAL DIRECTORY (*concluded*)





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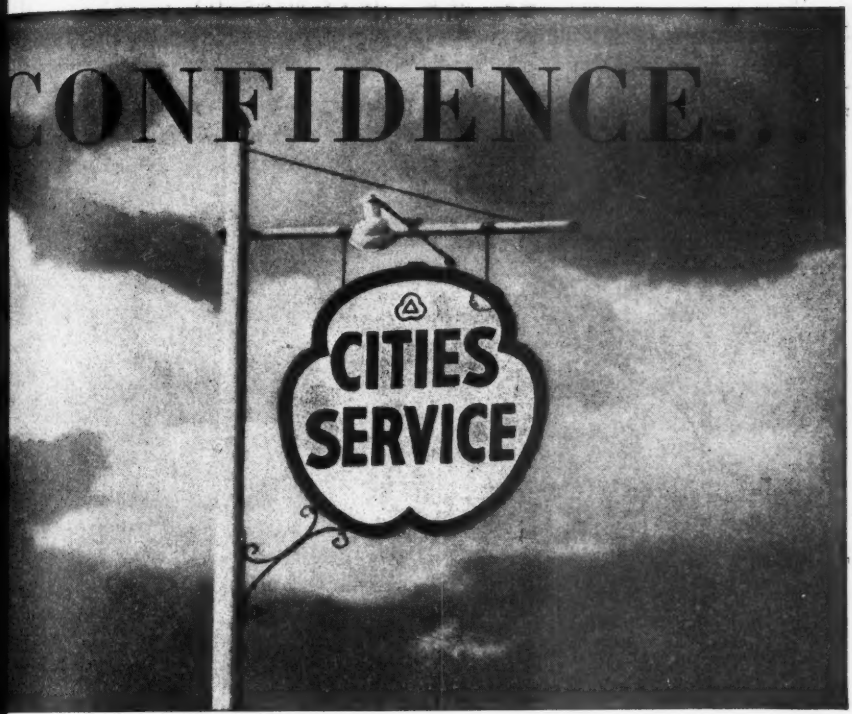


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